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Supreme Court, U.S.
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In The
Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an employee has been the victim of sexual harassment by a *co-worker*, is the standard for determining employer liability under Title VII:

(1) the rule in the Sixth Circuit, which requires the plaintiff to prove that the employer failed to deal in "good faith" with the harassment, or

(2) the rule in a majority of the courts of appeals, under which a plaintiff need only establish that the employer was guilty of negligence in failing to prevent or correct the harassment?

PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Latanua Rudd respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on January 5, 2006.

OPINIONS BELOW

The January 5, 2006, opinion of the court of appeals, which is not officially reported, is reprinted at 2006 WL 20555 (6th Cir.), and is set out at pp. 1a-4a of the Appendix. The March 23, 2006, order of the court of appeals denying rehearing, which is not officially reported, is set out at p. 20a of the Appendix. The January 26, 2004 opinion of the district court, which is not officially reported, is set out at pp. 5a-19a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on January 5, 2006. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 23, 2006. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 701(b) of Title VII, 20 U.S.C. § 2000e(b), provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agency of such a person. . . .

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

STATEMENT OF THE CASE

A federal jury found that the petitioner, Latanua Rudd, had been the victim of sexual harassment by a co-worker, in violation of Title VII of the 1964 Civil Rights Act. The harasser struggled at length with petitioner, repeatedly rubbed his body (and penis) against petitioner's body, handcuffed her to an office filing cabinet, and taunted her over the office intercom system. Several Sheriff's Deputies, including two supervisors, were aware at the time that this abuse was going on, and did virtually nothing to assist petitioner. The courts below agreed that the harassment was sufficiently serious to create an unlawful hostile work environment. The Sixth Circuit nonetheless overturned the jury verdict, applying that circuit's well-established but idiosyncratic rule that employers are not liable for co-worker harassment unless the employer failed to act in "good faith."

This case arises out of a campaign of gender-based harassment and physical abuse that openly continued over a period of three to four hours[1] at an office of the Shelby County Sheriff's Department.[2] The petitioner was at that time a Deputy Sheriff in the Sheriff's Department. The harasser was Sergeant Lance Burton, who outranked petitioner but was not her supervisor.

The harassment occurred throughout the evening of December 22, 2000, at the part of the office occupied by the Fugitive Transportation Division. Most of the events occurred in or near petitioner's cubicle, and were visible and/or audible to other law enforcement officers present in the area throughout the period, several of them less than a dozen feet away.[3] Burton entered petitioner's cubicle, and began to struggle with her, rubbing his body and penis against her neck, hips and buttocks.[4] Petitioner attempted to push Burton away, repeatedly told him loudly to stop and called in vain for the other officers in the room to assist her.[5]

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[1] Tr. 127, 128.

[2] Shelby County includes the City of Memphis.

[3] Tr. 64.

[4] Tr. 61 ("He came over to me at the back of my chair, I felt his hands reaching right around my shoulder blades and I feeled [sic] what felt like his penis on the back of my neck area."), 62 ("And while we were fighting, I could feel his penis on the back of my hip, my butt area, and I am trying to lean my body outward to keep space between us."), 129 ("When he came over there and grabbed me, that is when I felt him on me. That is when I felt his penis on my back rear area, when he came over and grabbed me."), 130 (same).

[5] Tr. 62-63 ("I kept yelling, and still at that time nobody came."), 65 ("Q. How many times did you call out for Mays to assist you. A. [Rudd] Several times. Q. Did Mays or Braswell ever come to your aid? A. No, sir."), 288 (another Deputy in the room heard Rudd tell Burton to stop "several times"), 290 ("Q. Officer, did you or Officer Mays ever approach

(Continued on following page)

Burton dismissed petitioner's efforts to resist, admonishing her "Oh, you think you can take this old man, don't you."[6] Burton persisted, and began to remove petitioner's equipment from her person, tossing her handcuffs, baton and a magazine of ammunition onto the floor outside her cubicle.[7] Burton attempted to seize petitioner's handgun, but she fought him off.[8]

After this struggle had persisted for some time, Burton forcibly handcuffed petitioner to a filing cabinet.[9] The district court correctly noted that that action constituted an assault and battery. (App. 11a). At this point Burton himself urged his fellow officers to come closer to observe petitioner's plight,[10] and several did so.[11] Petitioner was only released when a female officer finally unlocked the handcuffs. With that one exception, none of the officers who observed this harassment took any action to protect

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Burton and ask him to quit doing what he was doing. A. [Officer Braswell] No, sir, we did not.").

[6] Tr. 61-62.

[7] Tr. 61-63.

[8] Tr. 64 ("it seemed like he was trying to get my gun belt, or my gun. But I kept trying to protect my gun.").

[9] Tr. 64-65 ("He got my hand close to him and twisted it all the way around to the back. And then at that time is when he handcuffed [me] to this filing cabinet.").

[10] Tr. 64 (Burton called out, "Oh, yeah, you can come look at her now. She ain't tough after all. I got her shit out in the floor and she ain't tough, come look at what I did to her.").

[11] Tr. 65 ("then, my co-workers came to look to see what he had done. . . . Officer Brasswell and Officer David Mays, both came."), 65 ("Q. Did [Mays and Brasswell] ever see you handcuffed to the filing cabinet. A. [Rudd] Yes, sir, they both did.").

petitioner from the assault or even told Burton to stop.[12] After the handcuffs were unlocked, petitioner gathered her equipment and took refuge in a restroom.

When she emerged from the restroom, petitioner spoke on the telephone with one of her supervisors, Sergeant Richard Nelson; while they were on the phone, another supervisor, Lieutenant Alvin Moore, came into the office. Petitioner proceeded to describe to Lieutenant Moore and Sergeant Nelson (who soon came to the office) what had occurred, including telling them that Burton "handcuffed me to a filing cabinet and he was rubbing himself on me."[13] Lieutenant Moore and Sergeant Nelson did not ask petitioner for details, did not ask Burton whether these allegations were true, and did not question any of the Sheriff's Deputies who had been present when the harassment occurred.[14] Neither supervisor conducted an investigation of any kind, filed any report regarding petitioner's complaint, or made any effort to separate petitioner from Burton.[15]

Although Burton was present at the time petitioner described the abuses to Lieutenant Moore, Moore said nothing to Burton.[16] Lieutenant Moore testified that

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[12] During the handcuffing incident, one Deputy Sheriff commented to Rudd and Burton, "Well, I don't see nothing and I don't hear nothing." (Tr. 65). Sergeant Nelson and Lieutenant Moore, Rudd's supervisors, both testified that any Deputy Sheriff who saw Rudd handcuffed to the filing cabinet should have come to her assistance. (Tr. 237-38, 348).

[13] Tr. 69-70; *see* Tr. 80, 207.

[14] Tr. 71, 75, 269, 291-92, 313-14, 345-47.

[15] Tr. 71, 74, 314, 346-48.

[16] Tr. 69:

(Continued on following page)

subsequently, as he was leaving the office for the night, he told Burton vaguely to "stop messing with my people."[17] Petitioner recalled Lieutenant Moore's remarks differently, testifying that Moore instead only instructed Sergeant Nelson – in terms that "didn't sound serious" – to say something to Burton.[18] No witness testified that Sergeant Nelson himself ever issued any such admonition to Burton. Burton certainly acted as if he had not been admonished in any way, proclaiming after Lieutenant Moore departed, "Oh, the Lieutenant is gone now and now its really on."[19]

Despite petitioner's complaint to Lieutenant Moore and Sergeant Nelson, the harassment continued unabated, much of it in the actual presence of one or both of the supervisors. Burton placed a "belly chain" around petitioner, who pushed the chain off.[20] Sergeant Nelson saw the incident, and Lieutenant Moore either saw or heard it, but neither supervisor said or did anything;[21] several other Deputies laughed at petitioner's predicament.[22] Burton went on the office loudspeaker and taunted petitioner, "So,

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Well, I was waiting for Lieutenant Moore to – you know, to say anything like, you know, "Let's have a report, or did this really happen." He said nothing. And then a few minutes later he said, "The only thing I can say is that you've represented the Fugitive Transportation Division the best you could."

[17] Tr. 344, 360.

[18] Tr. 73.

[19] Tr. 74.

[20] Tr. 233-34, 320. A belly chain is a steel restraining device used "to stop the prisoner's movements once they are cuffed." Tr. 311.

[21] Tr. 310, 320, 343, 357-58, 369.

[22] Tr. 311.

is it too hot in the kitchen, baby,"[23] a taunt that would have been audible to Sergeant Nelson.[24] Burton disassembled petitioner's police radio,[25] an incident of which Sergeant Nelson was also aware. Abandoned by both her supervisors and the other law enforcement officers in the office, petitioner finally left the office.

The Sixth Circuit correctly summarized the response of Lieutenant Moore and Sergeant Nelson to these protracted abuses: "Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22." (App. 4a).

Lieutenant Moore justified his inaction by insisting that petitioner had never told him about the physical struggle or handcuffing,[26] directly disputing petitioner's testimony to the contrary. Lieutenant Moore further insisted that petitioner was actually "smiling" and "laughing"[27] when she described Burton's actions. Sergeant Nelson only denied having been told about the handcuffing, not about the rest of Burton's actions,[28] and (unlike Lieutenant Moore) acknowledged that petitioner was upset.[29] Sergeant Nelson explained that at the time he had improperly dismissed Burton's actions as mere "horseplay,"[30] and acknowledged that he had erred in not taking

[23] Tr. 74.

[24] Tr. 75.

[25] Burton subsequently reassembled the radio.

[26] Tr. 341, 344.

[27] Tr. 359.

[28] Tr. 319, 323.

[29] Tr. 312.

[30] Tr. 316, 318, 325.

preventative measures.[31] The conflicting testimony regarding what petitioner had told Lieutenant Moore and Sergeant Nelson, and whether Moore had ever said anything at all to Burton, were issues presented to and resolved by the jury.[32]

On December 23 petitioner returned to work, and complained to a third supervisor. The response was different than what had occurred on December 22. The supervisor to whom petitioner spoke on December 23 referred the matter to the Internal Affairs Bureau, which five days later opened an investigation. Within a month, the Department reprimanded both Sergeant Nelson and Lieutenant Moore for having failed to assist petitioner. Thereafter, the Department notified Burton that he would be demoted to the rank of Patrolman, suspended for thirty

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[31] Tr. 317:

> Q. [Counsel for defendant]. All right. You should have intervened, correct?
>
> A. Yes, sir.

[32] In his closing argument, counsel for the County urged, for example:

> Lt. Moore testified that he did not know that night, that [Rudd] did not tell him that she had been handcuffed. Sgt. Nelson says that he did not know on the night of December the 22nd that she had been handcuffed. [Counsel for plaintiff] says it is inconceivable that they didn't know. . . . Well, they both testified. You decide who is telling the truth. I submit that she may have thought that she told him. She may have been telling them and Burton interrupted. They did not hear her. They testified truthfully.

Tr. 768.

Following the jury verdict for plaintiff, counsel for the county properly acknowledged in the Sixth Circuit that "[f]or the purpose of this appeal, Rudd's testimony must be taken as true." Brief for Appellants, *Rudd v. Shelby County, Tennessee*, No. 04-5939 (6th Cir.), 13.

days without pay, and placed on probation for six months. Burton appealed that discipline, and the Department ultimately agreed to permit Burton to retire at full rank and pay.[33]

The events of December 22, 2000, caused petitioner serious psychological trauma. She began psychiatric care in January, 2001, and in early January 2001 went on sick leave, never returning to her job at the Shelby County Sheriff's Department. From January 2001 until August 2002 the County paid petitioner on-the-job injury benefits. In October, 2002 the Shelby County Retirement Board awarded petitioner a line-of-duty disability pension. That pension is substantially lower than the wages that petitioner was earning when she worked for the Sheriff's Department.

Petitioner commenced this action against Shelby County alleging, *inter alia*, that the events in question constituted sexual harassment and gender discrimination in violation of Title VII. Petitioner's contention that the County was responsible for that harassment and discrimination rested in particular on the refusal of Sergeant Nelson and Lieutenant Moore and other Deputy Sheriffs to take action to assist petitioner during the events of December 22.[34] The County unsuccessfully moved for summary judgment on the issue of whether it was legally liable for the harassment that occurred on that date.[35] A

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[33] The intervening suspension and demotion cost Burton $4,987.56.

[34] Tr. 727-33.

[35] In denying that motion, the district court explained:

> The County maintains that, when Rudd complained about Burton's actions on the following day to Sergeant Roberson,

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jury found that petitioner had been harassed because of her gender, that the harassment unreasonably interfered with her work performance and created a hostile environment, and that Shelby County was responsible for failing to prevent or end that harassment. The jury awarded petitioner $9,112 in backpay, $306,208 in front pay, and $635,000 in compensatory damages.

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the County immediately initiated an internal affairs investigation which resulted in Burton's being disciplined.

Rudd does not dispute these contentions (although she notes that Burton's demotion was only temporary and that he was permitted to retire at the rank and with the pension of a Sergeant). She asserts, however, that despite the County's corrective action in the period after December 22, 2000, the County is liable because it failed to take corrective action promptly when it reasonably should have known that she was being harassed. First, she alleged that the incident on December 22, 2000, could not have and did not go unnoticed. She avers that Burton was calling out in an attempt to gather an audience. Further, Rudd claims that she was calling out to a fellow officer, David Mays, by name in an attempt to get assistance. That she was calling out is supported by the fact that she was only freed from the handcuffs when Officer Brinda Beard heard what was occurring and assisted Rudd by removing the handcuffs. Rudd alleges further that Sgt. Nelson witnessed the belly chain incident and took no action. . . .

The court concludes that genuine issues of material fact remain about whether the county took prompt corrective action when it reasonably should have been aware that the alleged behavior was occurring. The sex-based character of the incident could have been inferred from the belly chain incident. There is evidence that a number of officers, including Sgt. Nelson, a superior officer, were aware of what was occurring and did not intervene.

Order Granting in Part and Denying in Part The Motion for Summary Judgment of Defendants Shelby County and Sheriff A.C. Gilless, pp. 10-11.

The defendant moved for judgment as a matter of law.[36] It argued, *inter alia*, that it could not be held liable for the abuses that occurred on December 22 because in the days and weeks *after* the harassment the County's Internal Affairs Bureau (IAB) had investigated the incident and imposed disciplinary measures on Burton, Lieutenant Moore and Sergeant Nelson.

The district court rejected the County's argument, emphasizing that petitioner's claim had been based on the failure of County officials to take action on December 22 itself, while the campaign of harassment was still going on.

> Focusing on the IAB investigation would ignore the response that Rudd contends was not prompt

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[36] The County also moved for judgment as a matter of law during the trial. In denying that motion, the district court held there was sufficient evidence in the record to prove that on December 22 Lieutenant Moore and Sergeant Nelson were aware of the ongoing sexual harassment and failed to take action to end that abuse.

> I believe there is sufficient evidence in this case for a jury to conclude that management was aware of what was going on. And the testimony in this case is also that while Lieutenant Moore and Sergeant Nelson were present on the scene, Sergeant Burton . . . draped those belly chains around her. Lieutenant Moore heard it, knew that it happened. And it was even subsequent to that that Sergeant Burton went on the intercom.
>
> So I believe there is sufficient evidence here for a jury to find that these two individuals who were her supervisors . . . who were in the management capacity of the Sheriff's Department were aware of the ongoing sexual harassment, and that the jury should conclude it was sexual harassment. . . . The jury could then conclude that management – members of the management of the Sheriff's Department witnessed it and failed to stop it.

Tr. 673-74.

> and adequate. After being sexually harassed and physically assaulted by Burton, Rudd complained to Moore and Nelson. There is ample basis for the jury's conclusion that she complained and that Moore and Nelson's response was inadequate. Moore later told Rudd he considered the incident a "joke". . . . Burton continued harassing Rudd for several hours after supervisors became aware of the situation. The jury could reasonably have concluded that Nelson knew, or should have known, about this harassment after Burton used the public address system to mock Rudd. When a victim of sexual harassment complains, the response cannot be "prompt and adequate" where the harasser is openly allowed to continue his harassment and announces to the entire department that the harassment is continuing.

(App. 15a).

On appeal the Sixth Circuit concluded that petitioner "clearly satisfied" most of the elements of a Title VII sexually harassment claim. The court of appeals held that Burton's conduct was "shocking," and that there was ample evidence that petitioner "was subject to unwelcome sexual harassment," that "the harassment was based on [Rudd's] sex," and that "the harassment unreasonably interfered with her work performance and created a hostile work environment." (App. 3a).

The Sixth Circuit nonetheless overturned the jury verdict, holding as a matter of law that Shelby County was not legally responsible for the proven sexual harassment. In doing so the court of appeals applied "the test set forth in *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997)." (App. 1a). Under the Sixth Circuit's longstanding rule in *Blankenship*, an employer is not

liable for co-worker harassment merely because it was negligent in failing to prevent or correct that harassment. Rather, *Blankenship* establishes and the Sixth Circuit applies a far more demanding standard – the victim of co-worker harassment must prove that the employer failed to act in "good faith" in dealing with that harassment. 123 F.3d at 873.

The court below explained that "[u]nder the *Blankenship* standard. . . . [i]f the employer responds in good faith, it cannot be held liable." (App. 3a). The Sixth Circuit accepted petitioner's evidence regarding the events of December 22, and the failure of Lieutenant Moore and Sergeant Nelson to stop the protracted abuse which they knew was occurring in the office. "Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22." (App. 4a).

The court of appeals held nonetheless that "the county's actions demonstrate a good faith effort to safeguard Rudd." (App. 4a). The Sixth Circuit's finding of good faith rested exclusively on the actions taken *after* December 22, by supervisors other than Lieutenant Moore and Sergeant Nelson. The court of appeals reasoned that the County had acted in good faith because a third supervisor, to whom petitioner complained on December 23,

> immediately referred Rudd to the Internal Affairs Division, and, within five days after the incident, the department commenced a formal investigation. Rudd was permitted to work in a separate facility so that she would not have to encounter Burton. Within a month, the department issued an oral reprimand to one of Rudd's immediate supervisors and a written reprimand to the other. Approximately one week later, the

> department gave Burton written notice that he would be demoted to the rank of patrolman, suspended for thirty days without pay and placed on probation for six months.[37]

(App. 2a).

Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition on March 23, 2006.

REASONS FOR GRANTING THE WRIT

THE COURTS OF APPEALS ARE DIVIDED REGARDING THE STANDARD OF LIABILITY FOR CO-WORKER HARASSMENT

This case presents an important question of law which this Court expressly reserved in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) – what is the standard under Title VII[38] governing employer liability for sexual or other harassment by a *co-worker*? This Court has repeatedly addressed the standard governing employer liability for harassment by a supervisor. *Suders*, 542 U.S. at 141-154; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998);

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[37] The court of appeals' opinion also sets forth this same litany of events, which that court regarded as the dispositive facts, at App. 4a.

[38] The same issue arises regarding co-worker harassment under other federal anti-discrimination statutes. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004) (42 U.S.C. § 1981); *Weigold v. ABC Appliance Co.*, 105 Fed. Appx. 702 (6th Cir. 2004) (Family and Medical Leave Act); *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (Americans with Disabilities Act). The lower courts have assumed that the standard for employer liability under these statutes is the same as under Title VII.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). But this Court's opinions have deliberately left unresolved the liability standard for co-worker harassment. "*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we." *Suders*, 542 U.S. at 143 n.2.[39]

In the absence of guidance from this Court, the lower courts have reached sharply divergent conclusions regarding this issue. The Sixth Circuit holds that an employer is not liable for co-worker harassment unless the employer's response to that harassment was so exceptionally callous that it demonstrated a lack of "good faith." That circuit for almost a decade has repeatedly insisted that a mere showing of negligence is insufficient to establish employer liability. A majority of the courts of appeals hold, to the contrary, that employers are indeed liable if they are negligent in dealing with co-worker harassment. The legal standard governing *employer* liability under Title VII is of overarching importance because the harassers themselves are not subject to liability under Title VII.[40]

The instant case exemplifies the striking difference between the Sixth Circuit's indulgent "good faith" standard and the more demanding negligence standard applied in most circuits. Had this case arisen in one of the circuits that apply the negligence standard, the jury verdict for petitioner would assuredly have been upheld on

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[39] The court of appeals quoted this passage from *Suders* in holding that it was free to apply the *Blankenship* "good faith" standard to co-worker harassment cases. (App. 3a n.1).

[40] *E.g.*, *Dearth v. Collins*, 441 F.3d 931, 933-34 (11th Cir. 2006); *Wathen v. General Elec. Co.*, 115 F.3d 400, 406 (6th Cir. 1997); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994).

appeal. A jury certainly could find that it is negligence for two supervisors to fail to stop ongoing sexual harassment, including harassment occurring in their presence. The complete failure of Sergeant Nelson and Lieutenant Moore to make any effort to ascertain the truth of petitioner's complaint – their failure to question petitioner, Burton, or any of several eye-witnesses – is particularly compelling evidence of negligence.

In the Sixth Circuit, on the other hand, negligence on the part of the Sheriff's Deputies involved simply did not matter. Not only is the Sixth Circuit's "good faith" standard less demanding than the negligence standard, the Sixth Circuit assesses an employer's good faith over the entire period when the employer might have responded to the harassment, and weighs the actions of all the officials involved. Thus under the Sixth Circuit standard in the instant case, disciplinary measures imposed in February 2001 were sufficient to establish that Shelby County had overall acted in good faith, despite severe misconduct on December 22, 2000 by County supervisors and others who spurned petitioner's plea for protection from ongoing abuse. Under the Sixth Circuit standard – unlike the negligence standard – that misconduct could be outweighed by actions taken by other County officials in the weeks that followed.

I. IN THE SIXTH CIRCUIT EMPLOYER LIABILITY UNDER TITLE VII FOR CO-WORKER HARASSMENT REQUIRES PROOF THAT THE EMPLOYER DID NOT ACT IN GOOD FAITH; MERE NEGLIGENCE IS INSUFFICIENT

For more than a decade the Sixth Circuit has held that an employer is only liable for co-worker harassment if

the harassment victim can demonstrate that the employer failed to respond in "good faith" to a problem of harassment. The controlling precedent in that circuit is *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997). The panel below expressly applied "the test set forth in *Blankenship*." (App. 1a; *see id.* at 3a ("the elements set forth in *Blankenship*"), 3a ("[u]nder the *Blankenship* standard"), 3a ("Rudd has clearly satisfied the first four elements of the *Blankenship* test, but she has not satisfied the fifth"), 4a ("Rudd has not proven the fifth element of the *Blankenship* test."), 3a n.1 ("We apply *Blankenship* because this case deals with coworker harassment.")).

Blankenship emphatically rejected the rule accepted by most circuits that an employer may be held liable for co-worker harassment if the employer was negligent in responding to that harassment. "Once an employer is aware of and responds to charges of sexual harassment, . . . *mere negligence* as to the content of the response cannot be enough to make the employer liable." 123 F.3d at 873 (emphasis added).[41] Rather, in the Sixth Circuit the controlling standard is whether the employer acted in "good faith." "When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination." *Id.* Although the employer's actions in *Blankenship* itself had proven clearly inadequate to end the harassment,[42] the Sixth Circuit

[41] Under *Blankenship* the good faith of an employer's actions are measured against the facts it knew or should reasonably have known. 123 F.3d at 873.

[42] After Blankenship had been harassed for several weeks, she complained to her supervisors both orally and in writing. Company officials thereafter merely kept an eye on her; "[n]one of the administrators

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nonetheless held that there was insufficient "evidence to refute the employer's claims that its actions were in good faith." *Id.* The employer's "measures may not have been sufficient," the court explained, but "they . . . easily satisfy the 'good faith' standard." *Id.*

When the Sixth Circuit adopted the good faith standard in *Blankenship*, that circuit knowingly and deliberately rejected the negligence standard that has been adopted by most other circuits. Judge Merritt pointed out in a dissenting opinion in *Blankenship* that other courts of appeals applied the very negligence standard which the Sixth Circuit rejected.

> Several courts have applied . . . agency principles, as directed by the Supreme Court, in coemployee cases. . . . Courts have cited the Restatement (Second) of Agency § 219(2)(b) for the familiar proposition that a master may be subject to liability for the torts of his servant, even if the servant is acting outside the scope of his or her employment, if "the master was negligent or reckless." *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990). . . . This theory of employer liability has been ratified many times over. "[I]t is clear, the criterion for when an employer is liable for sexual harassment is *negligence*. . . ." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995).

123 F.3d at 876 (Merritt, J., dissenting).

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confronted [the harasser] in any way." 123 F.3d at 871. A week after this first fruitless complaint, the harasser grabbed Blankenship's breasts and asked her out. When Blankenship and then another worker complained again, the employer still refused to discipline the harasser, and instead merely issued a written warning. When the harassment continued, Blankenship resigned. *Id.*

Blankenship remains entrenched law in the Sixth Circuit. Since the controlling Sixth Circuit decision in *Blankenship*, decisions in that circuit have repeatedly reaffirmed its core holding that an employer is not liable for co-worker harassment merely because it responded negligently to complaints about that abuse. "In determining whether a response was 'prompt and appropriate,' negligence in fashioning a remedy is not sufficient for the employer to incur liability." *Nievaard v. City of Ann Arbor*, 124 Fed. Appx. 948, 954 (6th Cir. 2005).[43] Thus in *Greenwood v. Delphi Automotive System, Inc.*, 103 Fed. Appx. 609 (6th Cir. 2004), the employer for three months had failed to take effective action to end the harassment about which the plaintiff had complained; the Sixth Circuit upheld summary judgment in favor of the employer, reasoning that the plaintiff's evidence "portray[s] at most mere 'negligence in the fashioning of a remedy.'" 103 Fed. Appx. at 612 (emphasis omitted). In *Southerland v. Sycamore Community School District Bd. of Education*, 125 Fed. Appx. 14, 19 (6th Cir. 2004), the Sixth Circuit held that it would be improper to instruct a jury that it could

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[43] *Greenwood v. Delphi Automotive System, Inc.*, 103 Fed. Appx. 609, 612 (6th Cir. 2004) (plaintiff's evidence insufficient because it proved no more than negligence); *Weigold v. ABC Appliance Co.*, 105 Fed. Appx. 702, 710 (6th Cir. 2002) ("mere negligence as to the content of the response cannot be enough to make the employer liable.") (*quoting Blankenship*); *Gwen v. Regional Transit Auth.*, 7 Fed. Appx. 496, 502 (6th Cir. 2001) (*quoting Blankenship*); *Boykin v. Michigan Dept. of Corrections*, 2000 WL 491512, *7 (6th Cir.) (*quoting Blankenship*); *Summerville v. Ross/Abbott Laboratories*, 1999 WL 623786, *7 (6th Cir.) (*quoting Blankenship*); *Birone v. Indian River School*, 1998 WL 199791, *3 (6th Cir.) (*quoting Blankenship*).

impose liability on an employer for co-worker harassment based on a showing of mere negligence."

Since the decision in *Blankenship*, panels in the Sixth Circuit have repeatedly applied the rule that to avoid liability for co-worker harassment "[a]ll that is required is 'good-faith.'" *Greenwood*, 103 Fed. Appx. at 612. *E.g., Nievaard v. City of Ann Arbor*, 124 Fed. Appx. 948, 955 (6th Cir. 2005) (summary judgment appropriate because plaintiff failed to show that employer's conduct "was not undertaken in good faith"); *Weigold v. ABC Appliance Co.*, 105 Fed. Appx. 702, 710 (6th Cir. 2002) ("When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination.") (*quoting Blankenship*); *Gwen v. Regional Transit Authority*, 7 Fed. Appx. 496, 502 (6th Cir. 2001) (" 'When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination.' . . . [T]he question we are faced with is . . . whether the [employer] failed to act in good faith. . . . [T]here simply is no evidence that the [employer] failed to act in good faith."); *Summerville v. Ross/Abbott Laboratories*, 1999 WL 623786, *7 (6th Cir.) (*quoting Blankenship*); *Birone v. Indian River School*, 1998 WL 199791, *3 (6th Cir.) ("Birone's supervisors did respond to her complaints . . . in ways that suffice to meet the *Blankenship* good-faith standard.").

The decision of the court of appeals in the instant case was a straightforward application of this entrenched Sixth Circuit standard.

" 125 Fed. Appx. at 19 (" 'mere negligence as to the content of the response cannot be enough to make the employer liable.' *Blankenship*. . . . The instruction . . . does not permit liability for mere negligence in an employer's response.").

II. A MAJORITY OF THE COURTS OF APPEALS HOLD THAT AN EMPLOYER IS LIABLE UNDER TITLE VII FOR CO-WORKER HARASSMENT IF THE EMPLOYER WAS NEGLIGENT IN FAILING TO PREVENT OR CORRECT THAT HARASSMENT

Most circuits, unlike the Sixth, hold that an employer is liable under Title VII if the employer was negligent in responding to complaints or information regarding sexual or other invidious harassment. In a majority of the courts of appeals, an employer which engaged in good faith but negligent conduct in dealing with co-worker harassment is held to have violated Title VII.

Outside the Sixth Circuit, negligence is the reigning standard in co-worker harassment cases. For example, the Third Circuit recently applied the negligence standard to a co-worker harassment case.

> When coworkers are the perpetrators, the plaintiff must prove employer liability using traditional agency principles. . . . Typically, the plaintiff in a coworker harassment case argues for direct employer liability on a theory of "negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment." *See Bouton* [*v. BMW of N. Am. Inc.*], 29 F.3d [103,] 106 [(3d Cir. 1994)] (citing *Restatement (Second) of Agency* § 219(2)(b)).

Jensen v. Potter, 435 F.3d 444, 452-53 (3d Cir. 2006) (opinion by Alito, J.); *see id.* (finding employee's evidence sufficient "to establish employer negligence.").

In his dissenting opinion in *Blankenship*, Judge Merritt noted that the good faith standard adopted by the Sixth Circuit in that case for co-worker harassment cases conflicted with the negligence standard utilized in such cases by

the Seventh Circuit. 123 F.3d at 876. In the years since the Sixth Circuit in *Blankenship* rejected the negligence standard, the Seventh Circuit has consistently and repeatedly applied that negligence standard.[45] Judge Merritt also noted

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[45] *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005) ("employers are liable for a coworker's harassment only 'when they have been negligent . . . in . . . remedying the harassment' ") (*quoting Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997)); *Venezia v. Gottlieb Memorial Hospital, Inc.*, 421 F.3d 468, 472 (7th Cir. 2005) (employer is "liable for the actions of [the victim's] coworkers if it negligently failed to . . . remedy them."); *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004) (plaintiff "must show that his employer has 'been negligent . . . in . . . remedying the harassment.' "); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 478 (7th Cir. 2004) (plaintiff may establish liability by proving that the employer "was negligent in . . . rectifying the racial harassment any other employee or employees directed at him."); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004) (plaintiff must "demonstrate [the employer] was negligent."); *Longstreet v. Illinois Dep't of Corrections*, 276 F.3d 379, 381 (7th Cir. 2002) (in a co-worker sexual harassment case an employer is liable "if it negligently failed to take steps to remedy the illegal harassment."); *Logan v. Kautex Textron North America*, 259 F.3d 635, 641 (7th Cir. 2001) ("in co-worker harassment cases, the plaintiff must show that the employer was negligent in failing to correct the harassment."); *Haugerud v. Amery School Dist.*, 259 F.3d 678, 696-97 (7th Cir. 2001) (employer liable for harassment by co-worker if "it negligently failed to take reasonable steps to . . . remedy the harassment."); *Mason v. Southern Ill. Univ. at Carbondale*, 233 F.3d 1036, 1043 (7th Cir. 2000) ("[t]he employer is liable for a hostile work environment created by the employee's coworkers . . . only when the employee shows that his employer has 'been negligent . . . in . . . remedying the harassment.' "); *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999) ("a plaintiff must show negligence in order to hold an employer liable for co-worker harassment"); *Wilson v. Chrysler Corp.*, 172 F.3d 500, 508 (7th Cir. 1999) ("[l]iability for co-worker harassment requires a showing of negligence on the part of the employer."); *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (employee can establish employer liability by proving that the employer "was negligent in preventing or remedying the harassment."); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir. 1999) (liability of employer turns on whether it "was negligent in responding to the harassment"); *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998) ("plaintiff must show negligence in order to hold an employer liable for co-worker

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in his dissent that the Tenth Circuit had adopted the negligence standard for co-worker harassment cases. 123 F.3d at 876. That remains the position of the Tenth Circuit.[46]

The negligence standard for determining employer liability for co-worker harassment has also been adopted by the First,[47] Second,[48] Fourth,[49] Fifth,[50] Ninth,[51] and

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harassment"); *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998) ("employers are liable for co-employee's harassment only when they have been negligent . . . in . . . remedying the harassment.").

[46] *Rennard v. Woodworker's Supply, Inc.*, 101 Fed. Appx. 296, 304 (10th Cir. 2004) (employer liable for co-worker harassment "where the employer was negligent"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998) (employer liable for co-worker harassment if it was negligent; plaintiff could prevail by demonstrating the employer's "negligence in allowing fellow employees to engage in sexual harassment.").

[47] *Noviello v. City of Boston*, 398 F.3d 76, 95 (1st Cir. 2005) ("When coworkers, rather than supervisors, are responsible for the creation and perpetuation of a hostile work environment, . . . several federal courts, including this court, have held that . . . an employer can only be liable if the harassment is causally connected to some negligence on the employer's part.").

[48] *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 441 (2d Cir. 1999) ("if the harasser is the victim's co-worker, the employer will be liable only if it is negligent.").

[49] *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325, 334-35 (4th Cir. 2003) ("noting that '[n]egligence sets a minimum standard for employer liability under Title VII' "; "[t]he jury properly imputed coworker harassment to [the employer] under the negligence . . . theory.").

[50] *Derouen v. Carquest Auto Parts, Inc.*, 2001 WL 1223628, *1 n.9 (5th Cir.) ("the negligence standard . . . governs liability for co-worker harassment"); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) ("[g]enerally, the negligence standard governs employer liability for *co-worker* harassment."); *Williamson v. City of Houston, Texas*, 148 F.3d 462, 465 (5th Cir. 1998) ("[a]s a number of courts have pointed out, employer liability for harassment by co-workers is direct liability for negligently allowing harassment.").

[51] *Swenson v. Potter*, 271 F.3d 1184, 1191 ("[n]egligence . . . exposes the employer . . . to liability for . . . the harm that the employer inflicted

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District of Columbia[52] Circuits. The New Hampshire Supreme Court, which construes that state's anti-discrimination laws in conformity with Title VII, has chosen to follow decisions in the Seventh and Ninth Circuits adopting a negligence standard for co-worker harassment cases,[53] and has rejected the Sixth Circuit interpretation of Title VII in *Blankenship* as inconsistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).[54]

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on the plaintiff as a result of its inappropriate response"), 1196 ("the employer cannot be held liable unless it reacts negligently to the harassment complaint.") (9th Cir. 2001); *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001) ("[i]f . . . the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent"); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) ("[w]hen harassment by co-workers is at issue, the employer's conduct is reviewed for negligence.").

[52] *Curry v. District of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999) ("a negligence standard governs employer liability for a co-worker's harassment.").

[53] *Madeja v. MPB Corp.*, 149 N.H. 371, 378, 821 A.2d 1034, 1043 (2003):

> [W]e rely upon cases developed under Title VII to aid in our analysis. . . . The employer is directly liable for its own negligence because its negligence caused the harassment. . . . the negligence standard of liability extends to both the employer's failure to discover and its failure to remedy co-worker sexual harassment. *See Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998) . . . *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001).

[54] 149 N.H. at 378, 821 A.2d at 1042-43:

> The defendant asserts that mere negligence is insufficient. *See Blankenship v. Parke Care Centers, Inc.* . . . . We believe that the defendant mistakenly relies upon *Blankenship*. Recent United States Supreme Court cases have abrogated its holding regarding employer liability for co-worker sexual

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III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT

This entrenched and intractable conflict regarding the standard of liability for co-worker harassment is a matter of considerable importance. Co-worker harassment, particularly co-worker sexual harassment, is a serious problem, and has given rise to a substantial volume of litigation. Because this Court's decision in *Faragher* and *Ellerth* holds employers to a high standard of care when harassment is engaged in by supervisors, employers which may not have met the *Faragher* and *Ellerth* standard frequently litigate whether a harassing official was in fact a supervisor of the victim.[55] If the harasser (as here) was not the victim's own immediate or higher level supervisor, the co-worker liability standard – whatever it may be – applies.

The Sixth Circuit's "good faith" standard is at odds with this Court's reasoning in *Faragher* that "[i]t would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to *prevent* violations." 524

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harassment. In *Burlington Industries, Inc. v. Ellerth* . . . and *Faragher v. Boca Raton*, . . . cases decided after *Blankenship*, the United States Supreme Court clarified that employer liability for co-worker sexual harassment may be predicated upon its negligence with respect to both the discovery of and remedy for co-worker sexual harassment.

[55] That is precisely what occurred in the instant case. The district court declined to apply the liability standard for supervisor harassment established by *Faragher* and *Ellerth* because Sergeant Burton had not "exercised actual supervisory authority" over Rudd. Order Granting in Part and Denying in Part The Motion for Summary Judgment of Defendants Shelby County and Sheriff A.C. Gilless, pp. 7-8 n.3.

U.S. at 806 (emphasis added). The point at which County officials could have prevented sexual harassment was on December 22, 2000, when a number of Sheriff's Deputies – including several supervisors – did little or nothing about the harassment that they well knew was going on. The County's obligation to prevent sexual harassment was not satisfied merely because later the next year – when petitioner was no longer working in the Sheriff's office – other (and in some instances higher ranking) County officials decided to punish the harasser.

The Sixth Circuit standard is inconsistent as well with this Court's repeated holding that employer liability for sexual harassment is governed by agency principles. *Faragher*, 524 U.S. at 791-803; *Ellerth*, 524 U.S. at 755-63; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70-72 (1986). Under the Restatement (Second) of Agency (1957), an employer is liable if the employer (or its agent) was negligent in failing to prevent misconduct by persons (such as Burton) on the employer's premises or under the employer's control. Where an employer's agent is negligent, the employer is legally responsible under agency principles, even if other (possibly higher ranking) agents earnestly disapproved or took actions after-the-fact to correct the misconduct that resulted. If Sheriff's Deputies had been negligent in permitting a drunkard to drive a squad car, Shelby County would have been liable for any resulting accident, regardless of whether those Deputies or the drunk driver were subsequently punished. The negligence of those Deputies in permitting the sexual harassment of petitioner is no different. The negligence standard in agency law is the very standard rejected by the Sixth Circuit, but accepted by most other courts of appeals. Certiorari should be granted to resolve this conflict as to

the legal standard applicable to co-worker harassment cases.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgement and opinion of the Sixth Circuit.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 04-5939

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LATANUA RUDD,	)
Plaintiff-Appellee,	) **ON APPEAL FROM**
	) **THE UNITED STATES**
v.	) **DISTRICT COURT**
SHELBY COUNTY, TENNESSEE,	) **FOR THE WESTERN**
	) **DISTRICT OF**
	) **TENNESSEE**
Defendants-Appellants.	)

(Filed Jan. 5, 2006)

BEFORE: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Shelby County, Tennessee, appeals the district court's denial of its motion for judgment as a matter of law in this sexual harassment case. Because we find as a matter of law that Shelby County took prompt and corrective action for purposes of the test set forth in *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), we reverse the decision of the district court.

Latanua Rudd, the plaintiff and appellee in this case, was a deputy sheriff in the Shelby County Sheriff's Department. She was sexually harassed by her co-worker, Sergeant Lance Burton. In a single afternoon, Burton handcuffed Rudd, bending over, to a file cabinet, rubbed himself on her, draped a belly chain around her neck and

asked via intercom whether it was "too hot in the kitchen" for her. Although the parties' accounts vary as to the actions taken by Rudd's immediate supervisors on the day of the harassment, it is clear that, on the following day, Rudd complained to a superior officer. That officer immediately referred Rudd to the Internal Affairs Division, and, within five days after the incident, the department commenced a formal investigation. Rudd was permitted to work in a separate facility so that she would not have to encounter Burton. Within a month, the department issued an oral reprimand to one of Rudd's immediate supervisors and a written reprimand to the other. Approximately one week later, the department gave Burton written notice that he would be demoted to the rank of patrolman, suspended for thirty days without pay and placed on probation for six months. He appealed the penalty, and while his appeal was pending, he retired with full rank and pay pursuant to a settlement agreement with the department. Rudd, who left her job within two weeks of the harassment, filed this action, claiming, among other things, that the conduct of her co-worker Burton constituted sexual harassment and gender discrimination and created a hostile work environment in violation of 42 U.S.C. § 2000e ("Title VII") and the Tennessee Human Rights Act. A jury awarded her almost $1 million in compensatory damages, back pay and lost future wages.

After the district court refused to grant judgment as a matter of law pursuant to Fed. R. Civ. p. 50(b), Shelby County filed this appeal. We review *de novo* a district court's denial of judgment as a matter of law. *McMurdy v. Montgomery County, Ohio,* 240 F.3d 512, 517 (6th Cir. 2001).

The outcome of this case depends not on the egregiousness of Burton's behavior but on whether Rudd has proven the elements set forth in *Blankenship*.[1] 123 F.3d at 872. In order to prevail in a coworker harassment case under *Blankenship*, an employee must prove that (1) the employee is a member of a protected class; (2) the employee was subject to unwelcomed sexual harassment; (3) the harassment was based on the employee's sex; (4) the harassment unreasonably interfered with her work performance and created a hostile work environment; and (5) the employer knew or should have known of the charged sexual harassment and failed to implement prompt and corrective action. *Id.* This standard is "markedly different" from the one applied to harassment by supervisors. *Id.* at 873. Under the *Blankenship* standard, "the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." *Id.* If the employer responds in good faith, it cannot be held liable. *Id.* Finally, "the appropriateness of a response depends on the frequency and severity of the alleged harassment." *Id.* at 872.

Rudd has clearly satisfied the first four elements of the *Blankenship* test, but she has not satisfied the fifth. Officer Burton's conduct – shocking as it was – does not

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[1] We apply *Blankenship* because this case deals with coworker harassment. Although Shelby County invites us to look to the Supreme Court's decision in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), we decline to do so. *Suders* dealt with applicability of the *Ellerth/Faragher* defense to cases where a hostile work environment was created by a supervisor. *Id.* at 143. Burton was not Rudd's supervisor: he was her coworker. The Court wrote in *Suders*, "*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we." *Id.* n.6. Accordingly, *Blankenship* applies.

relieve Rudd of the burden of proving that Shelby County failed to take prompt and effective corrective action once it learned of Burton's harassment. *Blankenship,* 123 F.3d at 873. The evidence, viewed in the light most favorable to Rudd, does not permit such a finding. Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22. On December 23, Rudd notified a superior officer, who referred her that very day to the Internal Affairs Division. The Internal Affairs Division asked her to file forthwith a detailed written report of the harassment, which she did. Contemporaneously, Rudd was permitted to begin working in a separate facility, away from Burton. By December 28, the Internal Affairs Division had begun its investigation. In a little over a month, the department had notified Burton of the discipline it intended to impose, and had actually disciplined Rudd's supervisors. Although Burton's early retirement was galling to Rudd, it removed him from the department, and, in any event, Rudd did not return to work at the department after January 6, 2001.

We find as a matter of law that the county's actions demonstrate a good faith effort to safeguard Rudd, and that no reasonable jury could have concluded that Shelby County failed to take prompt and corrective action. Because Rudd has not proven the fifth element of the *Blankenship* test, we **REVERSE** the district court's order denying judgment as a matter of law and **REMAND** the case for judgment in favor of Shelby County.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

LATANUA RUDD,	)	
Plaintiff,	)	
v.	)	**No. 01-3020 Ma/V**
SHELBY COUNTY, TENNESSEE,	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION TO INCORPORATE THE JURY'S FRONT PAY AWARD INTO FINAL JUDGMENT AND DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR FOR NEW TRIAL, OR FOR REMITTITUR, OR TO VACATE THE AWARD OF BACK PAY AND FRONT PAY

(Filed Jan. 26, 2004)

Before the court are two pending motions. The first is Plaintiff's October 17, 2003 motion to incorporate the jury's front pay award into final judgment. Defendant filed a short response on October 27, 2003, and referred the court to its own motion to vacate the award of front pay filed concurrently. The second is Defendant's October 27, 2003 renewed motion for judgment as a matter of law, or for new trial, or for remittitur, or to vacate the award of back pay and front pay. Plaintiff filed a response on November 6, 2003. For the following reasons, Plaintiff's motion is GRANTED and Defendant's motion is DENIED.

I. Background

A. Factual Background

The following evidence was adduced at trial. Plaintiff, Latanua Rudd, is a former commissioned deputy sheriff with the Shelby County Sheriff's Department. On the night of December 22, 2000, a co-worker, Sergeant Lance Burton, sexually harassed her and assaulted and battered her. The assault and battery occurred when Burton forcibly handcuffed Rudd to a filing cabinet in her cubicle. Burton also threw certain of Rudd's personal items from her cubicle and invited their co-workers to view Rudd handcuffed to the filing cabinet, No one came to Rudd's assistance during the incident, although a fellow officer later unhandcuffed her.

Later on the night of December 22, Rudd informed her immediate supervisors, Lieutenant Alvin Moore and Sergeant Richard Nelson, of what had occurred. Rudd asked Moore, before he left the office, to instruct Burton not to say anything to her or to put his hand on her. Moore responded by telling Burton to leave Rudd alone and by telling Nelson to take care of her. After Moore left the office, Burton told Rudd "now it's really on." Following the supervisors' notice of the handcuffing incident, three more incidents occurred that night. First, Burton used the public address system to announce to Rudd and others: "What's wrong, Tammy, is the heat too hot in the kitchen?" Second, Burton disassembled Rudd's radio, although he reassembled it after Rudd complained to Nelson and Nelson suggested leaving the radio on the chief's desk with an explanatory memo. Third, Burton confronted Rudd at the copying machine, and Rudd suggested they settle their differences outside. Nelson observed this

confrontation and drew his hand across his throat. Burton then apologized and left.

As a result on the incidents on December 22, 2000, Rudd became disabled and has been unable to return to work in law enforcement. The mental health professionals retained by the County have advised her that she will probably be unable to return to work in law enforcement. Competent testimony indicated that any other work for which Rudd is qualified would pay much less than her job with Shelby County.

B. Procedural Background

Beginning September 29, 2003, the court held a jury trial on Rudd's claims under the Tennessee Human Rights Act ("THRA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Tennessee Governmental Tort Liability Act ("TGTLA"). The jury was charged on October 6, 2003, and returned a verdict the same day, finding for Rudd on her THRA and Title VII claims, but finding for Shelby County on the TGTLA claim. Shelby County has submitted a brief with eight arguments about why it should be granted judgment as a matter of law or some alternative form of relief.

II. Standards

A. Renewed Judgment as a Matter of Law

Federal Rule of Civil Procedure 50 governs judgments as a matter of law. Judgment as a matter of law is appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). A motion for judgment as a

matter of law may be renewed "no later than 10 days after entry of judgment."[1] Fed. R. Civ. P. 50(b). The question is whether there is sufficient evidence to raise a question of fact for the jury. *Hicks v. Frey*, 992 F.2d 1450, 1456 (6th Cir. 1993). In deciding this issue, the court must view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in her favor. *See id.* "[T]he trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury." *Ratliff v. Wellington Exempted Village Schs. Bd. of Ed.*, 820 F.2d 792, 795 (6th Cir. 1987).

B. New Trial

Federal Rule of Civil Procedure 59(a)(1) provides for a new trial "in an action in which there has been a trial by jury, for any reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." "Generally courts have interpreted this language to mean that a new trial is warranted when a jury has reached a 'seriously erroneous result' as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion. . . ." *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). When the moving party contends that the jury's verdict was against the weight of the evidence, the trial court should:

> compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion

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[1] The renewed motion for judgment as a matter of law was formerly referred to as judgment notwithstanding the verdict ("JNOV").

> that the verdict is against the clear weight of the evidence. It should deny the motion if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable.

Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 541-42 (6th Cir. 1993). "A court may not substitute its judgment for that of the jury. . . ." *Holloway v. Wal-Mart Stores, Inc.*, 909 F. Supp. 534, 536 (E.D. Tenn. 1995). The court must accept any reasonable verdict. *Id.*

III. Analysis

The court will address each of Shelby County's arguments in turn.

A. Lance Burton's Speculative Answers to Hypothetical Questions Should Have Been Excluded

Defendant previously raised this issue in a motion *in limine*. The court denied that motion by order entered September 25, 2003. The court's view of the law has not changed, and this argument is not well-taken for the reasons stated in the September 25, 2003 order.

B. Inconsistent Verdicts

Defendant claims that the jury's verdicts holding Shelby County liable under the THRA and Title VII, but finding no liability under the TGTLA, are inconsistent. To find for Rudd on the THRA and Title VII claims, the jury

found that she had proven: (a) that Lance Burton harassed her because of her gender, (b) that supervisory employees knew or should have known of Burton's sexual harassment, and (c) that the supervisory employees failed to take prompt and appropriate corrective action. To find for Shelby County on the TGTLA claim, the jury found that Rudd had not proven that she was subject to offensive physical contact as the foreseeable consequence of Shelby County's failure to take reasonable precautions to protect her from the threat of such contact posed by Lance Burton. Defendant claims that, under the facts of this case, Shelby County was on notice as to the risk that Burton was likely to sexually harass someone *and* that he was likely to assault and batter someone, or it was on notice as to neither risk.

When confronted with "apparently conflicting jury findings, the court has a duty under the seventh amendment to harmonize the answers, if it is possible to do so under a fair reading of them." *Gosnell v. Sea-Land Serv. Inc.*, 782 F.2d 464, 466 (4th Cir. 1986). If the jury's verdicts can be read as "expressing a coherent and reasonable view of the case," the court should adopt that reading. *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1148 (6th Cir. 1996).

The verdicts in this case are reconcilable. The jury's finding for Shelby County under the TGTLA indicates that it did not consider the assault and battery by Burton upon Rudd foreseeable. The assault and battery claim in this case arose from Burton's handcuffing Rudd to a filing cabinet. The test is forseeability. There is evidence that, after this incident, Rudd reported what had happened to her supervisors Lt. Moore and Sgt. Nelson. The test is whether they knew or should have known of Burton's sexual harassment and taken corrective action. Even after

Moore and Nelson became aware of Burton's actions, they allowed continued contact between Burton and Rudd during the night. Burton continued to harass Rudd, although that harassment did not rise to the level of assault and battery. The jury could have based its determination that Shelby County was liable under the THRA and Title VII on the harassment which occurred after the assault and battery and after the assault and battery and earlier sexual harassment had been reported to Moore and Nelson. Interpreting the verdicts in this way, although it may not have been foreseeable that Burton would commit assault and battery, Moore and Nelson knew or should have known, after learning of the assault and battery and sexual harassment, that Burton might continue such behavior and should have taken corrective action. The jury's verdicts are not irreconcilable and can be read consistently with each another.

C. Burton's Conduct After the Handcuffing Incident Was Not Severe or Pervasive

Although Shelby County devotes a portion of its brief to the argument that the verdicts were inconsistent, it appears to realize that the verdicts can be reconciled as the court has done. The County argues, however, that if the court reconciles the verdicts in this way, the County should be granted judgment as a matter of law. According to the County, Burton's conduct after the handcuffing incident was not so severe or pervasive as to create an objectively sexually hostile work environment under the THRA or Title VII. Rudd contends that the jury could have properly looked to all of the events which occurred the night of December 22, 2000 in deciding whether she was forced to endure a hostile work environment.

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Relevant circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* The situation must be such that a reasonable person would consider it hostile or abusive. *Id.* at 21.

The court concludes that there was sufficient evidence to create an issue of fact for the jury on this issue, thus preventing the court from granting the renewed motion for judgment as a matter of law. Further, having compared the opposing proofs and weighed the evidence, the court finds that the jury could reasonably draw the conclusion it did. Therefore, the court is prevented from granting a new trial.

The question is whether Rudd was subjected to a hostile work environment. The County's liability for any such hostile work environment is determined separately. *See Fuller v. City of Oakland, California*, 47 F.3d 1522, 1528 (9th Cir. 1995) (considering all the incidents in determining whether a hostile work environment existed, then considering liability). Shelby County cites no case for the proposition that events which occur prior to notice cannot be considered in determining if a work environment is hostile.[2] Further, the events prior to notice may

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[2] The opposite is true. *See Fuller*, 47 F.3d at 1527-28 (considering events which occurred prior to notice in determining if a hostile work environment existed); *cf. Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002) (holding the district court erred by not considering discriminatory

(Continued on following page)

color the lens through which the post-notice activities are viewed by both the jury and the court. *See Kline v. City of Kansas City, Missouri*, 175 F.3d 660, 665 (8th Cir. 1999) (citing *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998) ("'instances of harassment occurring outside the [limitations] period may be admissible to provide relevant background to later discriminatory acts'"); *Ramsey*, 286 F.3d at 268 (stating that time-barred events are relevant background information). For instance, the phrase "What's wrong Tammy, is the heat too hot in the kitchen?" by itself would be a mere offensive utterance. However, given that a number of Rudd's co-worker's had seen her humiliated by Burton earlier that night, this question, broadcast over the public address system, could be viewed as humiliating. In addition, the three post-notice incidents that occurred the same night qualify as frequent. The fact that Burton's continued harassment of Rudd almost escalated into a second physical confrontation indicates that the harassment was physically threatening. Finally, Rudd became disabled as a result of the events that night. The harassment, therefore, unreasonably interfered with her work performance. There was a question of fact for the jury, and the jury's answer to that question was reasonable.

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incidents that occurred outside the filing period in determining if a hostile work environment existed).

D. Rudd's Statements to Her Supervisors Did Not Constitute Notice to Them of Sexual Harassment

The County claims that, in any event, it cannot be held liable for any of the events which occurred on December 22, 2000, because Rudd's statements to Moore and Nelson were insufficient to constitute notice of sexual harassment. Rudd testified that she informed Moore and Nelson of Burton's actions earlier that night, although she did not label it sexual harassment at the time. Whether or not this was sufficient notice to Shelby County of sexual harassment was a question of fact for the jury. Judgment as a matter of law is inappropriate because there was sufficient evidence that Rudd had provided notice to create an issue of material fact for the jury. The jury's finding that Rudd provided adequate notice of sexual harassment was reasonable and not against the weight of the evidence. The court will not disturb the jury's verdict.[3]

E. The IAB Investigation was Prompt and Adequate

The County next argues that the Internal Affairs Bureau ("IAB") investigation was prompt and adequate. Where an employer takes prompt corrective action, it cannot be held liable. *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 829-30 (6th Cir. 1999). Shelby County cites *Stevens v. U.S. Postal Serv.*, 21 Fed. Appx. 261, 264 (6th Cir. 2001) (unpublished), for the proposition that an employer can wait

[3] The County also argues that it did not have constructive notice through Rudd's coworkers. The court does not address this argument in light of its decision that adequate evidence supports the jury's implicit finding that Rudd's supervisors had actual notice.

three days before separating a harasser and his victim and that its actions will be considered prompt. The *Stevens* court, however, noted that such a delay was acceptable "under the circumstances." *Id.* Those circumstances included the fact that the alleged harasser's actions did not actually create a hostile work environment. *See id.*

Focusing on the IAB investigation would ignore the response that Rudd contends was not prompt and adequate. After being sexually harassed and physically assaulted by Burton, Rudd complained to Moore and Nelson. There is ample basis for the jury's conclusion that she complained and that Moore and Nelson's response was inadequate. Moore later told Rudd he considered the incident a "joke" and responded to it that night by telling Burton to leave Rudd alone. Burton did not in fact leave Rudd alone, and Burton indicated that Rudd's complaint would lead to an escalation in his level of harassment. Burton continued harassing Rudd for several hours after supervisors became aware of the situation. The jury could reasonably have concluded that Nelson knew, or should have known, about this harassment after Burton used the public address system to mock Rudd. When a victim of sexual harassment complains, the response cannot be "prompt and adequate" where the harasser is openly allowed to continue his harassment and announces to the entire department that the harassment is continuing.

F. The Compensatory Damages Should Be Reduced

In the alternative, the County contends that, if the court finds sufficient evidence to support the jury verdict, the compensatory damages awarded should be reduced.

"[A] jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990) (quotation omitted). Only where the amount awarded results from passion, bias, or prejudice or is so excessive as to shock the conscience of the court should the jury's verdict be reduced. *Id.* If credible evidence supports the jury's verdict, it should not be disturbed. *Id.*

The County argues that, because the most traumatic aspects of Burton's harassment of Rudd occurred before the County was given notice, $635,000 is more than the maximum amount that could be found compensatory. The County is correct that Rudd may not recover for the events which occurred prior to notice. *See Curry v. District of Columbia*, 195 F.3d 654, 664-65 (D.C. Cir. 1999) (Wald, J., concurring). However, credible evidence supports the jury's verdict as to Rudd's damages. The medical experts at trial testified that Rudd's psychological harm could not be compartmentalized, with each event assigned a percentage of the "blame" for Rudd's condition. There is no evidence before the court that the events before notice were the "most traumatic" in the sense that they were the greatest contributors to Rudd's harm. Further, there was testimony that Rudd's condition partially resulted from her perception of her supervisors' inability or unwillingness to stop the harassment after she made a complaint. The court will not disturb a jury award which is amply supported by credible expert testimony. Although it is difficult to assess damages in a case like this, the amount awarded is not beyond the maximum that could reasonably be awarded.

The award did not result from passion, bias, or prejudice and does not shock the conscience of the court.

G. The Jury's Award of Back Pay and Front Pay Should Be Vacated

The County argues that, because the most traumatic aspects of Burton's harassment of Rudd occurred before the County was given notice, she should not receive back pay or front pay. The court has addressed this argument in part III.F *supra*.

H. The Award of Front Pay Should Be Vacated Because Rudd Failed to Mitigate Her Damages

Finally, the County argues that Rudd has intentionally limited her income and, therefore, cannot collect front pay. That contention is not supported by the facts of this case. The County cites *Roush v, KFC Nat'l Mgmt. Co.*, 10 F.3d 392 (6th Cir. 1994), arguing that Rudd, like the plaintiff in *Roush*, voluntarily decided not to seek alternative employment in order to receive a payment from a governmental entity. Roush, having been wrongly terminated from her job with KFC, decided to work part-time, when she could have worked full-time. *Id.* at 400. She made her decision because her Social Security benefits would have been reduced had she worked full-time, and she would not have received more money despite working more hours. *Id.*

The County argues that Rudd, like Roush, decided to limit her income to receive a government payment. Unlike Roush, however, Rudd receives a disability pension because she became disabled on the job (because of Burton's

harassment). The County's own medical experts testified that Rudd was disabled and should not return to work in law enforcement. Rudd did not "voluntarily" limit her income in order to receive a disability pension. Either Rudd was disabled and entitled to the pension, or she was not. Rudd made no decision to limit her income, beyond the decision to follow the advice of the County's doctors that she was unfit to return to work. The County cannot argue that Rudd should have returned to work, thus mitigating her damages, when its own experts declared her disabled.

There was testimony that Rudd could return to the workforce in a field other than law enforcement. Rudd's qualifications for other employment, however, are minimal, and the expert testimony indicated that she could not expect to earn more than $15,244 annually, as opposed to the approximately $40,000 annually she made in law enforcement. Based on those figures, plaintiff's economics expert estimated Plaintiff's lost front pay at somewhere between $237,850 and $526,874. The lower figure took into account potential disability payments, while the higher figure assumed a salary of $15,244 annually. Thus, the testimony presented to the jury as to lost front pay assumed mitigation of damages. Although a plaintiff's award may be reduced for failure to mitigate damages, failure to mitigate does not deprive a plaintiff of the right to any recovery, assuming there are damages beyond what could have been mitigated.[4] *See In re Foote Mem'l Hosp./PCIS Litig.*, 1991

[4] *Roush* does not provide otherwise. The *Roush* court indicated that, had Roush mitigated her damages, no front pay award would have been necessary because her present salary would have been comparable to her previous salary. 10 F.3d at 400. Thus, Roush was barred from recovering front pay because mitigation would have eliminated her front pay damages.

WL 202613, at *9 (6th Cir. 1991) (stating that failure to mitigate is irrelevant where mitigation would not affect recovery); *Smith v. Manausa*, 535 F.2d 353, 355 (6th Cir. 1976) (holding failure to mitigate does not totally bar recovery). The jury's verdict of $308,208 was within the range presented to them and the court will not disturb a jury verdict supported by credible expert testimony. The court will, therefore, incorporate the jury's front pay award into the final judgment.

IV. Conclusion

For the foregoing reasons, the court DENIES Defendant's renewed motion for judgment as a matter of law, or for new trial, or for remittitur, or to vacate the award of back pay and front pay. Plaintiff's motion to incorporate jury's front pay award into final judgment is GRANTED.

So ORDERED this 22nd day of January 2004.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

No. 04-5939

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LATANUA RUDD, Plaintiff-Appellee, v. SHELBY COUNTY, TENNESSEE, Defendant-Appellant.	)	ORDER (Filed March 23, 2006)

BEFORE: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

(B)

No. 05-1612

FILED
JUL 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Respondent submits this Brief in Opposition to the Petition for a Writ of Certiorari.

Because Petitioner cannot establish a prima facie case of sexual harassment under any standard of liability, including the standard that she urges the Court to consider, the judgment of the Sixth Circuit Court of Appeals is correct, and the petition should be denied.

STATEMENT OF THE CASE

Petitioner Latanua Rudd, a female, was harassed on the job by a male co-worker, Lance Burton, when he wrestled with her and handcuffed her to a filing cabinet. At the time of the incident, both Rudd and Burton were commissioned deputy sheriffs employed by Respondent Shelby County Sheriff's Department. Rudd testified that Burton did not try to fondle her breasts, buttocks or private parts, but she felt his penis on her hip while they were wrestling. (Trial Transcript (hereinafter "TR") 137) Several co-workers heard the commotion, but none witnessed Burton rubbing himself on Rudd. Later that night when Rudd related the incident to her supervisors, she did not tell them that she could feel Burton's penis while they were wrestling. (TR 140 & 79-80) She did not tell them that Burton had sexually harassed her. (TR 141 & 217) She asked her supervisor Lt. Moore to tell Burton to leave her alone, and Lt. Moore did exactly what she asked him to do. He told Burton to leave her alone. Rudd conceded in her Complaint (¶ 33) that "Sgt. Nelson and Lt. Moore finally instructed Sgt. Burton not to bother Ms. Rudd." Although Burton taunted Rudd with gender-neutral verbal

jabs before and after the wrestling/handcuffing incident, ("Is it too hot in the kitchen, baby?" – Page 7 of Petition) he did not touch her again after Lt. Moore told him to leave her alone.

Rudd knew that Shelby County had a written sexual harassment policy with a complaint procedure. On four previous occasions, Burton had offended her by touching her inappropriately. She considered each separate incident an act of sexual harassment, but she never reported him for sexually harassing her. (TR 160-64)

On the night of the handcuffing incident, Rudd did not tell anyone that she wanted to file a complaint against Burton for any reason. (TR 141) The next day, she telephoned the Sheriff's Department to report his inappropriate behavior. She spoke with Lt. Floyd Bonner in the Internal Affairs Bureau ("IAB"). Bonner asked Rudd to submit a written report. (¶¶ 12-17 of Trial Exhibit 50 – Stipulated Facts (hereinafter "SF")) As the result of her phone conversation with Bonner, she and Burton were separated, and the IAB immediately initiated an investigation. (TR 324 & SF ¶¶ 20 & 21) Rudd had no interactions with Burton after the night he handcuffed her to the filing cabinet. (SF ¶ 11)

After the IAB investigation was completed, Burton was suspended without pay for 30 days and demoted. (SF ¶¶ 34 & 35) The suspension and demotion cost him $4,978.56. (SF ¶ 37)[1] Rudd's two supervisors were also

[1] Burton appealed the discipline to the Shelby County Civil Service Board. Before the appeal was heard, he settled the matter by retiring at the rank of sergeant. In the settlement, he did not recoup any lost wages. His retirement pension is based on his highest 36 months of employment and not his rank. (TR 676-77) His pension benefits will

(Continued on following page)

disciplined as the result of the IAB investigation. (SF ¶ 38-40)

REASONS FOR DENYING THE WRIT

I. Petitioner cannot establish a prima facie case of sexual harassment under either the negligence or deliberate indifference standard.

The Court has explained that "[a]n employer is negligent with respect to sexual harassment (and therefore liable under Title VII) if it knew or should have known about the conduct and failed to stop it." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759, 118 S.Ct. 2257, 2267 (1998).

The foregoing statement was presaged by *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872-873 (6th Cir. 1997), cert. denied, 522 U.S. 1110 (1998), where the Sixth Circuit held that to prevail on a claim of sexual harassment, a victim must show, among other things, that her employer "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."

In *Faragher v. Boca Raton*, 524 U.S. 775, 799, 118 S.Ct. 2275, 2289 (1998), the Court cited *Blankenship* to support its statement that the Courts of Appeals have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard."

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always be lower because of his demotion and the corresponding reduction in pay for his last few months of employment.

The first prong of this negligence standard, "*knew or should have known of the harassment*," is an objective standard which "equates *negligent* ignorance of the existence of harassment with *intentional* discrimination." *Blankenship*, 123 F.3d at 873. (Court's emphasis) Thus, "negligence as to the existence of harassment may be enough" for an employer to incur liability for sexual harassment by a co-worker. *Id.*

The second prong of the negligence standard imposes Title VII liability where the employer "*failed to implement prompt and appropriate corrective action*" once it knew or should have known of the sexual harassment.

Petitioner's argument focuses on *Blankenship's* interpretation of this second prong of the negligence standard where the Sixth Circuit explained that "mere negligence as to the content of the response cannot be enough to make the employer liable." 123 F.3d at 873. Instead, the employer will be liable only if its remedy to correct the hostile work environment "exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination." *Id.*

Judge Merritt filed a concurring opinion in *Blankenship* suggesting that the standard should be labeled as "deliberate indifference by the employer to the sexual harassment in its workplace." 123 F.3d at 875.

Judge Ryan also filed a concurring opinion agreeing that the district court's summary judgment should be affirmed because the victim's employer had responded reasonably to her allegations of sexual harassment. He disagreed, however, with the majority's adoption of the "good faith" standard for judging an employer's response to charges of sexual harassment. 123 F.3d at 876-77.

This "reasonable care" or "good faith" standard is not "idiosyncratic" as Petitioner suggests. (Petition page 2) It is similar to the Third Circuit's standard: "Even if not effective, an employer's remedial measure is nonetheless adequate if 'reasonably calculated' to end the harassment." *Jensen v. Potter*, 435 F.3d 444, 453 (3rd Cir. 2006) (opinion by Alito, J.). The Seventh Circuit also recognizes this standard. *See, Shaw v. AutoZone*, 180 F.3d 806, 812 (7th Cir. 1999) ("The law does not even require that the employer's actions prevent harassment, but merely that its response was reasonably likely to prevent future harassment").

In the case sub judice, Rudd's trial testimony and other evidence in the record establish that under either standard, indifference or negligence, Shelby County took appropriate corrective action once it knew or should have known of the alleged sexual harassment. *See, Courtney v. Landair Transport, Inc.*, 227 F.3d 559, 565 (6th Cir. 2000) ("We agree with the court below that, taking the evidence in the light most favorable to plaintiff, the defendant's conduct was not *negligent or indifferent* to plaintiff's situation."). (Emphasis added)

It was Rudd's responsibility to inform her supervisors that she perceived Burton's conduct as sexual harassment. However, she told no one that he had sexually harassed her. Under these circumstances, Shelby County cannot be liable under Title VII for failing to respond. *See, Shaw v. AutoZone, Inc.*, 180 F.3d at 812-813 ("Because Shaw never informed AutoZone of Noble's alleged harassment and because it had no reason to know of the harassment, there was nothing for AutoZone to respond to."); *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3rd Cir. 1999) (when employees' complaints do not refer to *sexually* offensive

behavior, employers are not on constructive notice of sexual harassment); *Jacob-Mua v. Veneman*, 289 F.3d 517, 523 (8th Cir. 2002) (Employee failed to establish that employer knew of alleged racial harassment when in her report to her supervisor, she did not indicate or imply that the altercation had anything to do with race); *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("The law requires an employer to be reasonable, not clairvoyant."); *Schiraldi v. AMPCO System Parking*, 9 F.Supp.2d 213, 218 (W.D.N.Y. 1998) (Plaintiff's statement, "Please keep Tyrone away from me; he's bothering me," did not give the employer notice of sexual harassment); and *Cooper-Schut v. Visteon Automotive Systems*, 361 F.3d 421, 426 (7th Cir. 2004) ("the employee must give the employer enough information to make a reasonable employer think there was some probability that she was being sexually harassed").

It is undisputed that when Rudd reported Burton's misconduct to Lt. Bonner the day after the incident, Lt. Bonner initiated an IAB investigation and had Rudd and Burton separated so that Rudd never again had any interactions with Burton after the day he handcuffed her to the filing cabinet. (TR ¶¶ 11-22; and TR 324)

Because under either standard, deliberate indifference or negligence, Shelby County's response was prompt and effective, the writ should be denied.

II. The evidence is sufficient to establish the *Faragher/Ellerth* affirmative defense.

Where no tangible employment action is involved, a defending employer may raise an affirmative defense, by showing:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765; and *Faragher*, 524 U.S. at 807.

Shelby County raised the *Faragher/Ellerth* affirmative defense in its Answer and has asserted it throughout the proceedings. Both the district court and the Sixth Circuit declined to consider the affirmative defense because Burton was Rudd's co-worker and not her supervisor. The Sixth Circuit quoted *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 n. 6, 124 S.Ct. 2342 (2004), as follows: "*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we." (Footnote 1 on page 3a of Petition)

Two sentences in *Suders* explain the breadth of the affirmative defense. First, the Court observed that:

> [H]arassment so intolerable as to cause a resignation may be effected through (1) co-worker conduct, (2) unofficial supervisory conduct, or (3) official company acts.

542 U.S. at 148, 124 S.Ct. at 2355. (Numbering added)

A few sentences later in the opinion, the Court held:

> [W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.

542 U.S. at 148, 124 S.Ct. at 2355.

Because the affirmative defense is obviously available to an employer in a case of constructive discharge caused by either co-worker (sexually harassing) conduct or unofficial supervisory (sexually harassing) conduct, the affirmative defense should also be available in a case where, as here, co-worker sexually harassing conduct does not result in a constructive discharge. There is no logical justification to hold otherwise.

If the Court grants the petition for a writ of certiorari, Shelby County will ask the Court to consider also the availability of the *Ellerth/Faragher* affirmative defense in cases of co-worker harassment because Rudd never availed herself of the protections of the written sexual harassment policy, and she suffered no tangible employment action.

III. This case does not involve "a wrong without a remedy."

Rudd has already received, and is receiving, significant relief from Shelby County for the psychological injuries she suffered as the result of being handcuffed to the filing cabinet. For the past several years, she has been receiving a tax free line-of-duty disability pension from Shelby County. The monthly benefit was $2,122.14 as of January 1, 2003. (¶ 9 of Seward's statement, Joint Appendix ("APX") 248)

She also has a workers compensation lawsuit pending against Shelby County based on the same incident. (APX 408)

In her Complaint initiating this action, she included a count alleging assault and battery against Lance Burton

in his individual capacity. The same day she filed suit in the U.S. District Court, she also filed an identical complaint in the circuit court of Tennessee containing the same claims against the same parties. Immediately before trial in the U.S. District Court, Rudd asked for and obtained an Order dismissing Burton without prejudice. (APX 363) Because her state court complaint against Burton is still pending in the circuit court of Tennessee, she still might obtain further redress without distorting Burton's offensive conduct into a civil rights violation. *See*, *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 522 (6th Cir. 2001).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

Supreme Court, U.S.
FILED
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No. 05-1612

In The Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE EXISTENCE OF AN IMPORTANT INTER-CIRCUIT CONFLICT IS NOT DISPUTED

Respondent does not dispute the existence of the inter-circuit conflict described in the petition. The petition sets out 10 decisions in the Sixth Circuit applying that circuit's entrenched "good faith" standard; respondent neither denies the existence of that standard nor disputes our characterization of Sixth Circuit caselaw. The petition sets out 31 decisions in numerous other circuits which apply the very different negligence standard; respondent neither denies the existence of that standard nor disputes our characterization of this large body of caselaw in those other circuits.

Respondent asserts that it would be entitled to prevail "under either standard." (Br. Opp. 5). That assertion necessarily acknowledges the obvious – that there are indeed two distinct and conflicting standards being utilized by the courts of appeals to determine when an employer is liable for co-worker harassment.

Respondent seeks to minimize the significance of this conflict by asserting that the Sixth Circuit's "good faith" (or "deliberate indifference") standard is merely an "interpretation . . . of the negligence standard." (Br. Opp. 4).[1]

---

[1] Respondent indirectly suggests that these two standards are the same. "This 'reasonable care' or 'good faith' standard is not idiosyncratic." (Br. Opp. 5). By using the singular demonstrative pronoun "this" (rather than "these"), the singular form of "standard," and the singular verb "is," this sentence implies that the reasonable care standard and the good faith standard are one and the same. (As in, "The peony or lactiflora peonia originated in China and blooms in the spring.")

(Continued on following page)

The Sixth Circuit rule that "mere negligence" is insufficient to establish employer liability, according to respondent, is actually an "interpretation" of "the negligence standard." *Id.* That somewhat Orwellian statement makes no sense. Negligence and "good faith" are mutually exclusive standards; one cannot be a construction of the other. The Sixth Circuit, sensibly, has never suggested that its repeated decisions rejecting the negligence standard are actually only an interpretation (and adoption) of that very rejected standard. To say that a requirement of bad faith or indifference is merely an "interpretation" of the less demanding negligence standard is like saying that the movie rating NC-17 (18 and older only) is an "interpretation" of the rating G (approved for general audiences).

The standard for determining when an employer is liable for the acts of an employee or agent is a potential issue in most civil actions against an employer, corporation, or government body. Where, as often occurs, Congress has not adopted an express liability standard, the courts must fashion the appropriate standard. This Court has repeatedly granted certiorari to resolve conflicts that have arisen under a wide variety of statutes as to the correct liability standard.[2] The liability standard under Title VII

The distinctions among these various standards of culpability – negligence, indifference, and good faith – pervade centuries of Anglo-American tort, contract, and criminal law, and cannot be caused to disappear by a grammatical sleight of hand.

[2] *E.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (Title VII); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999) (Title IX); *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998) (Title IX); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (Title VII); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (Title VII); *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997) (section 1983); *Canton v. Harris*, 489 U.S. 378 (1989) (section 1983); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989) (section 1983); *City of*

(Continued on following page)

for co-worker harassment is a matter of disagreement among the lower courts, and can only be resolved by this Court.

II. RESPONDENT'S FACT-BOUND ARGUMENTS WERE REJECTED BY THE COURTS BELOW

Respondent contends that it could not be held liable even under a negligence standard because on the day of the protracted harassment, December 22, 2000, Shelby County officials were not aware that Rudd was being harassed. (Br. Opp. 3-6).

Both courts below expressly rejected this factual contention. The Sixth Circuit correctly acknowledged that "Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22."[3] (App. 4a). The district court repeatedly held, as well, that there was ample evidence that on

---

St. Louis v. Praprotnik, 485 U.S. 112 (1988) (section 1983); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (section 1983); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (section 1983); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *see Meyer v. Holley*, 537 U.S. 280 (2003) (liability of corporate owner-operator under Title VIII for claims against corporation); *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (legal responsibility of tenant under Anti-Drug Abuse Act for actions of another person residing in apartment).

[3] Respondent prevailed in the Sixth Circuit because the court of appeals concluded that the County's response to that known harassment, taken as a whole, did not amount to a lack of good faith. The court of appeals did not dispute, nor apparently does respondent, that the "fail[ure] to take any corrective action" on December 22, 2000, in the face of known, ongoing harassment would constitute negligence. But in the Sixth Circuit, negligence is insufficient as a matter of law to establish employer liability for co-worker harassment.

December 22 Rudd's supervisors were aware that the abuse was occurring. The district court so concluded in denying respondent's motion for summary judgment,[4] respondent's motion for a directed verdict,[5] and respondent's post-trial motion for judgment as a matter of law.[6]

---

[4] Order Granting in Part and Denying in Part The Motion for Summary Judgment of Defendants Shelby County and Sheriff A.C. Gilless (June 3, 2003), 11 ("The court concludes that genuine issues of material fact remain about whether the county took prompt corrective action when it reasonably should have been aware that the alleged behavior was occurring. The sex-based character of the incident could have been inferred from the belly chain incident. There is evidence that a number of officers, including Sgt. Nelson, a superior officer, were aware of what was occurring and did not intervene.")

[5] Tr. 673:

> I believe there is sufficient evidence in this case for a jury to conclude that management was aware of what was going on. . . . [T]here is sufficient evidence here for a jury to conclude that these two individuals who were her supervisors, two of her three supervisors, who were in the management capacity of the Sheriff's Department were aware of the ongoing sexual harassment.

[6] App. 14a:

> The County claims that . . . it cannot be held liable for any of the events which occurred on December 22, 2000, because Rudd's statements to Moore and Nelson were insufficient to constitute notice of sexual harassment. Rudd testified that she informed Moore and Nelson of Burton's actions earlier that night, although she did not label it sexual harassment at the time. Whether or not this was sufficient notice to Shelby County of sexual harassment was a question of fact for the jury. Judgment as a matter of law is inappropriate because there was sufficient evidence that Rudd had provided notice to create an issue of material fact for the jury. The jury's finding that Rudd provided adequate notice of sexual harassment was reasonable and not against the weight of the evidence.

(Footnote omitted).

Respondent has not filed a cross-petition seeking review of this aspect of the Sixth Circuit's decision.

In the alternative, respondent suggests that if certiorari is granted it will argue that an employer in a co-worker harassment case can invoke the affirmative defense recognized for supervisor-harassment cases by *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Sixth Circuit rejected this argument (App. 3a n.1); respondent has failed to file a cross-petition on this issue.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgement and opinion of the Sixth Circuit.

Respectfully submitted,

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4

FILED
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No. 05-1612

In The
Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent,

PETITION FOR REHEARING

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Counsel for Petitioner (PRO-SE)

Petition For Rehearing

I was actively employed with Shelby County Government (Sheriff Department) from 1997 to 2000. This was a career I dearly loved and pursued for (7) years.

I reported to duty December 22, 2000 and my life was changed forever.

I am still under medical care and I must move on with my life and bring closure to such continuous pain, degradation, shame and embarrassment among my fellow peers.

I do not have case laws but I come to you with (TRUTH), a strong reputation of good character while employed with the Shelby County Sheriff's Department and determination to stand and fight for what is right!

I am representing myself in this matter now because the legal counsel feels this is a dead case with no possible way of resurrecting it without giving me an explanation from the Supreme Court. Because of their unbelief, they have made the decision to no longer represent me in this case. I was notified of this decision on 10/10/06 via telephone.

I am respectfully calling on the ***United States Supreme Court,*** who believes in Law and Justice to lend your ears once more to rehear this case and look once again at other omitted evidence not previously mentioned in the petition. This is one of many evidences not mentioned in the petition previously filed which proves that the Shelby County Sheriff's Department **did not act in good faith.** They have tried to cover their negligence through out this entire time even up to this point. It's the same evidence that convinced a group of Jurors, (all being of sound mind) of facts and truth. All information can be verified through case documents in The District Courts.

Other substantial grounds not previously mentioned:

Grounds: A brief summary on the above case.

(A). There was another subsequent incident happened to me while employed as a Shelby County Deputy Sheriff subsequent to the initial incident. I had to take off work due to my being sick both mentally and physically. I was waiting for my employers to make a decision as to what they were going to do about Sgt. Burton (initial incident). I had made several phone calls to the

internal affairs which at the time no one wanted to talk to me because of this incident. Detective Sneed (IAB) advised me of this reason. I started calling the dispatcher to find out the where about of another co-worker / friend Carl Harrison so that I could tell someone about the incident and to get advice. While listening to the dispatching of different calls I recognized the voice of Clarence Turks (a sibling friend from their child hood) I ask the dispatcher give him my phone number and ask him to call me. Officer Turks called me. I asked him if Carl Harrison was working that day. Turks said He (Harrison) was off duty. Turks then started telling me that he (Turks) heard about the Burton incident and asked if he (Turks) could come to my home to make sure that I was ok. I told him that was fine (he could) He asked me for my address because he had never been to my home. He called me very early one morning at which time I gave him my address allowed him to visit me. Turks started out by asking me "if I was ok"? This visit then led to him attempting to sexually assault me in my home. I fought him off and demanded him to leave my home. The First incident had already happened and now this second incident from both male co-workers whiles they were both on duty. Turks knew my siblings; they all grew up together in the same neighborhood. Turks (who is still employed with s.c.s.o.) would often refer to me as his little sister and would tell other superiors that he had to watch over me. This is why I trusted Him to visit my home. I had to give a statement to The Memphis City Police Sex Crimes. As I recall, there was a detective Bennet who took the statement. Detective Bennet advised me, that because of the first incident having already happened and this being such a high profile incident nothing could be done.

I went to the F.B.I.; they took a statement from me concerning both officers. I had no legal counsel at the time and I just didn't want the Shelby County Government to ignore these incidents. This information can be verified and is evidence of Shelby County not acting in good faith. This has been a pattern in the Department's history. **See the local news paper article attached.** Shelby County's very own Sheriff himself has charges of similar nature. This also proves this pattern has been previously known and continues within Shelby County.

(B). In addition to information, Lt. Alvin Moore called a meeting one day and advised me to keep quiet concerning the first incident or their would be ramification towards me during my career if I sought legal assistance. Which **He did not deny** saying during his deposition. Sgt Carroll Owens was also

present in this meeting. This incident can also be proven in case notes. **This was not acting in good faith.**

(C). I was also terminated via- U.S. mail by Mrs. Janet Bates (Shelby County Management) and refused unemployment which caused me to get on the food stamp program temporarily until I could find employment through unemployment agencies which was unloading large tractor-trailers at a Jewish Community Center and later working at The Rally Burger fast food. This information can be proven in case notes. **This was not acting in good faith.**

(D). I was told by my Physician Dan Boyd and Counselor Cindy Wescott that Shelby County had made several calls in and attempt to get me fully released from medical care and return to work full duty. **This was not acting in good faith.** Due to another **(independent)** Doctor Neal Aronov, who gave a 2nd and 3rd opinion of my medical status, stating to them **"that he did not think that was a good idea and that would be against medical orders"**, I was allowed to continue medical care. This report is noted in case notes.

(E). In addition to information above, the investigation was **only initiated** concerning the first incident involving Sgt. Burton because of my calling another friend / co-worker Sgt. Roberson (patrol division) who I had previously worked for (In Patrol Div.) and who knew of my work ethics. Sgt. Roberson was off duty. I told him what had happened and he sensed how upset I was with the first incident because I was crying. I asked him to contact someone for me to at least get a report done. He informed me that Shelby County was attempting to procrastinate in order to intentionally exclude the initial incident report. Also if a report was not done within a certain time frame, that whatever disciplinary action handed down to Sgt. Burton, he could appeal it through civil service and get re-instated. This is exactly what happened. He appealed the demotion and was allowed to retire with full Retirement status and pay because there was no incident report taken. **This was not acting in good faith**.

(F). Also after the Incident with Burton inside the Fugitive office. He (Burton) was only moved to the building next door (civil field office) which is the same office with (Clarence Turks) the co-worker that initiated the 2nd incident.

(G). When this (1st) incident went before the federal E.E.O.C. Board members, in their opinion Shelby County Supervisor(Burton) should not have allowed himself to be in a situation for such charges. After they conducted their investigation, they ruled in my favor. A few days later Shelby County completely stopped my income and all benefits without explanation. **This was not acting in good faith.** A few days later I was terminated by way of US. Mail. During the trial Shelby County (Janet Bates) initially stated she did not recall mailing the letter to my home. When Legal counsel attempted to show proof of the termination letter, she somehow suddenly remembered. According to Dr. Aronov this was not the correct action for Shelby County in any attempts to help the situation. **This was not acting in good faith.**

(H). Counselor Cindy Wescott who worked with me for years, allowed me to come into her office and work a few days to make a little cash so that I buy food after they refused my unemployment benefits before food stamps were approved. **This was not Shelby County acting in good faith.**

(I). Shelby County also testified that If I should go to work anywhere or for any company that my pension and benefits will instantly stop. Even if it were a part-time Job to supplement my income, Due to this situation that they have caused, I have had to constantly borrow money from everywhere and everybody so I can just to be able to live. This has been a constant (six year struggle) I had to drop out of a local University while trying to better my life because of the expense of books. Because I am now age 39 , I have not qualified for any decent amount of student loans or grants that I have applied for due to my pension. Shelby County provides College reimbursement which I once had and other co-workers are afforded.

In conclusion: There is something that the Federal E.E.O.C. saw that you respectfully need to see which influenced them in their decision. There is information that the (Independent) Medical professional saw in this case, that you may respectfully need to see. I am speaking of Dr. Aronov who played a major part in my receiving a pension monthly to live on. This was not Shelby County's idea. There is much evidence in this case that proves over and over that Shelby County tried to cover and hide their negligence. There's a host of information that the Federal Jurors heard and saw that you would have to respectfully look into to see how they could reach their ruling. There's only one way for you to hear Shelby County witnesses over and over admitting to guilt and negligence and lies after being less than truthful

during depositions. That is to listen to the proof, facts, evidences and testimonies that convinced a reasonable Jury. In Law Enforcement we were trained to protect and serve especially our own. We were taught to report truth and facts. We were also constantly taught to adhere to rules and follow Laws of the State and Government. The Laws were never written to be ignored or broken. There are consequences to our actions when we break Laws and ignore policies. My Shelby County work File is and has always been clean. My work ethics have always been none less than professional, (can be proven in case notes). Because of these incidents I have been force to live in a place of life where there has been a constant struggle for the last six years only because I reported truth and facts and adhered to written laws and Shelby County's own policies. Truth is meant to be stood on and upheld in the face of all odds. This same Truth is what I stand on today and shall continue until I see it through to the end.

I am now asking each one of you to close your eyes for a moment and imagine if I were your youngest sister, daughter or spouse.... Would you want the whole truth to be heard and prevail in this matter?

I have a petition with 3000+1 signatures in reference to my case. (available upon request)

Respectfully submitted

Latanua Rudd

See: Exhibit #1. This is a copy of a formal incident report that was found in my personnel file (one) year later. This was discovered during the deposition. **There is no officer's name on the form that completed the report**. There is **not a signature** on it where I was to sign. The reason is because **(no formal report was done). This form was back dated to cover their negligence.** Had Shelby County taken a report then Sgt. Burton would not have had grounds for the appeal through the civil service. Therefore He would not have been promoted back to Sgt. and then full retirement. This is addition evidence to prove that Shelby County **did not act in good faith.** In deposition you will see where I questioned the defense counsel about this form.

See: Exhibit #2. This is a copy of the **very first** investigative report that was done by Shelby County dated **January 3,2001. This is the first time that anyone from Shelby County allowed me to sit down and questioned me concerning the incident.** Lt. Bonner, who my friend contacted for me, **called me (over the phone)** and asked me **why was no report done in that department.** He said he was on vacation and asked me to write down what happened and stick it under his door. He also said when he returned from vacation he would tend to the matter. Information can be verified.

See: Exhibit #3. This is a copy of the **second time** Shelby County questioned me. This was because of the prisoner belly chains, which, I can't remember still even to this day. The supervisors reported this incident when Internal Affairs questioned them following my initial report on **January 11,2001. Which also proves that Shelby County did not act in good faith.** They witnessed this (I don't remember).

See: Exhibit #4. A copy of my first day pay **at Rally Burger**. Dated 11-01-01.

See: Exhibit #5. A copy of proof of my **previous work ethics** and good reputation among my former peers. A Sgt. F. Jackson asked me if I would be interested in coming to the Shelby County Narcotics Division. He asked me to submit a letter to Inspector Wing. The request transfer date is **(12-23-00).** This whole incident ended my career in Law Enforcement, which was all I ever really knew. I never made it to the Narcotics Division.

See: Exhibit #6. A copy of the letter that initiated the Retirement Pension. Because of this 2nd opinion and decision from Dr.Aronov. (Independent decision)

See: Exhibit #7. A copy of a letter from the federal E.E.O.C. to prove that Shelby County attempting to avoid charging Sgt Burton. Shelby County had to be forced by outside agencies to discipline him at all. With Shelby County allowing **such time to expire before writing any official report** *(which was never done)* caused Sgt. Burton to be rewarded instead of disciplined. This is also additional proof that Shelby County **did not act in good faith.**

Exhibit 1

SHELBY COUNTY
INJURY/ACCIDENT INVESTIGATION REPORT

MAJOR ☐ MINOR ☒ FIRST AID ☐ INJURY NO.

NAME: Patrolwoman LATANYA Rudd S.S. NO. 409-47-6606 9/26/68 OCCUPATION: Deputy Sheriff
FOREMAN DEPT. UNIT

DATE INJURED: 12-22-2000 TIME: 9 AM PM DATE REPORTED: 12-23-00 TIME: 9 AM PM

NATURE OF INJURY (BRUISE, ABRASION, CONTUSION, BURN, FRACTURE, ETC.): TRAUMATIC INCIDENT

RETURNED TO WORK ☒ SENT TO DOCTOR ☐ SENT TO HOSPITAL ☐ SENT HOME ☐

LOCATION OF ACCIDENT (IN OR NEAR WHAT BUILDING, STREET, ROAD): 201 POPLAR AVE FUGITIVE OFFICE

WITNESSES: Pilcon MAYES, BARNELL, Pilcon REED

DESCRIPTION OF ACCIDENT (GIVE FULL DETAILS): Pilcon RUDD WAS VICTIMIZED BY ANOTHER EMPLOYEE TO THE POINT IT BECAME A SPECIFIC TRAUMATIC INCIDENT - AS A RESULT OFFICER RUDD HAS FOUND IT DIFFICULT TO RETURN TO WORK BECAUSE OF THE MENTAL ANGUISH

(CONTINUE ON BACK OF SHEET IF NECESSARY)

DESCRIBE DAMAGE TO MATERIAL OR EQUIPMENT AND ESTIMATE COST OF REPAIR OR REPLACEMENT.

N/A

(CONTINUE ON BACK OF SHEET IF NECESSARY)

WHAT HAS BEEN OR WILL BE DONE TO PREVENT SIMILAR INJURIES

TO BE COMPLETED BY IMMEDIATE SUPERVISION

What was the basic cause of the accident? (Select one basic cause, mark with a X - Circle contributing causes)

A.—SUPERVISORY RESPONSIBILITIES

- ☐ No instructions given.
- ☐ Incomplete instructions.
- ☒ Rules, standards or instructions not enforced.
- ☐ Personal safety devices not provided or job. (Goggles, Safety Belts, Masks, Respirators, etc.)
- ☐ Correct or safe tools or equipment not provided.
- ☐ Inadequate inspection of equipment or jobs.
- ☐ Improper method of doing work.
- ☐ Poor job planning.
- ☐ Too much rush.
- ☐ Other

B.—PERSONAL ACTION OR CHARACTERISTIC OF EMPLOYEE

- ☐ Haste or short cuts.
- ☐ Equipment such as jacks, skids, hoists, etc., provided but not used.
- ☐ Goggles, respirators, gloves, masks, etc., provided but not used.
- ☐ Improper or unsafe tool or equipment used.
- ☐ Horseplay or fooling.
- ☐ Instructions or rules disregarded.
- ☐ Inattention.
- ☐ Inexperience.
- ☐ Physical condition of employee.
- ☐ Improper body position.
- ☐ Improper method of doing work.
- ☐ Action of fellow employee.
- ☐ Other N/A

C.—UNSAFE EQUIPMENT OR MATERIALS

- ☐ Ineffectively guarded equipment.
- ☐ Unguarded equipment.
- ☐ Defective materials.
- ☐ Defective tools.
- ☐ Defective equipment (not motor vehicles).
- ☐ Defective motor vehicle equipment.
- ☐ Unsafe equipment or material of contractor, non-employee or customer.
- ☐ Improper type or poor design.
- ☐ Other N/A

D.—UNSAFE CONDITIONS

- ☐ Poor light.
- ☐ Poor ventilation.
- ☐ Bad housekeeping.
- ☐ Improper piling or storing.
- ☐ Tools, equipment or materials scattered around.
- ☐ Slippery floors or walkways.
- ☐ Unsafe condition caused by contractor, non-employee or customer.
- ☐ Faulty layout of plant or facilities.
- ☐ Exits or emergency escapes inadequate or not provided.
- ☐ Other N/A

00017

(WITHIN 48 HOURS OF ACCIDENT, FILL IN AND RETURN ORIGINAL TO SAFETY DEPT., SECOND COPY TO PERSONNEL, THIRD COPY TO SUPERVISOR'S FILES)

INVESTIGATED BY _____ DATE _____

FORMS CONTROL C-1972-81-7

Exhibit #2

THE FOLLOWING IS GONNA BE A TAPED STATEMENT FROM PATROLWOMAN LATANUA K. RUDD, S-4735. SHE IS A PATROLWOMAN CURRENTLY ASSIGNED TO THE HOSPITAL PRISON WARD ON BAKER SHIFT. TODAY'S DATE IS GONNA BE JANUARY 3RD, 2000, THE TIME IS 15:47 HOURS. PRESENT WHILE MS. RUDD GIVES HER STATEMENT WILL BE HER UNION REP PRESENT, SGT. CECIL BOOKER OF THE DEPUTY SHERIFF'S ASSOCIATION. TYPED BY L. GARRISON.

LANDRY: Before I take a statement from you Ms. Rudd do you want a copy of your Garrity provided by the union made a part of your official statement?

RUDD: Yes sir.

LANDRY: I'm not gonna read it at this time, but it will be made a part of your official statement.

LANDRY: This statement will be taken in the Internal Affairs Office by myself, Sgt. K. B. Landry, of Internal Affairs. This statement is gonna involve an incident which occurred on December 22nd, 2000, in the Fugitive Office. Is that correct Ms. Rudd?

RUDD: That's correct.

LANDRY: If you would, Mr. Rudd, tell me of the events that took place and be as detailed as you can of what happened on the 22nd in Fugitive that resulted in you writing this letter.

BOOKER: Sgt. Landry, if you would sir, we understand that Deputy Rudd has been called here to make a statement, is that correct?

LANDRY: That's correct.

BOOKER: Is this a statement as a condition of her employment?

LANDRY: It is.

BOOKER: Are there any allegations against Deputy Rudd?

LANDRY: No.

BOOKER: So she's a witness in this investigation?

LANDRY: Correct.

Exhibit #3

THE FOLLOWING IS GOING TO BE A SUPPLEMENT STATEMENT TO PATROLWOMAN LATANUA RUDD, S-4735 STATEMENT. TODAY'S DATE IS JANUARY 11, 2001. THE TIME IS 12:19 P.M. THE STATEMENT WILL BE TAKEN IN THE INTERNAL AFFAIRS OFFICE BY MYSELF, SGT. K. B. LANDRY, OF THE INTERNAL AFFAIRS DIVISION. ALSO PREWENT WHILE MS. RUDD GIVES HER STATEMENT WILL BE PATROLWOMAN MICHELLE SNEED.

LANDRY: Ms. Rudd, at this time you want a union rep present while you give this statement?

RUDD: No sir.

LANDRY: Okay, ah I got a couple a questions I wanta ask you Ms. Rudd since I got you back up here. Ah, about the, I've already taken one statement from you and I've got a couple a follow-up questions. Ah, the first one is gonna be ah on the night of the 22nd, when this incident took place between yourself and Sgt. Burton, ah I wanta ask you if you recall an incident or anything happening while you were in the office talking with Lt. Moore where possibly a chain of some type was involved?

RUDD: No sir.

LANDRY: You don't recall any such incident as that?

RUDD: No, I do not. I don't recall a chain at all.

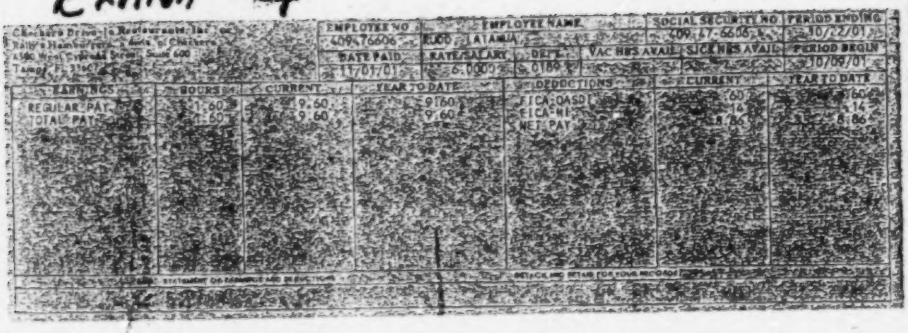
LANDRY: Okay, you don't recall anybody comin up from behind you draping something over you maybe?

RUDD: No, I don't recall it. On that night I was preety upset. I was very angry. I was hurt, frustrated so I'm not saying that it did not happen, I'm just saying as far as me being able to recall it, I simply do not recall it.

LANDRY: Okay, all right, ah let me ask you again to recall exactly what it was that you told Lt. Moore, and when you told Lt. Moore.

RUDD: Okay, after the incident had happened and I had returned from the restroom ah.

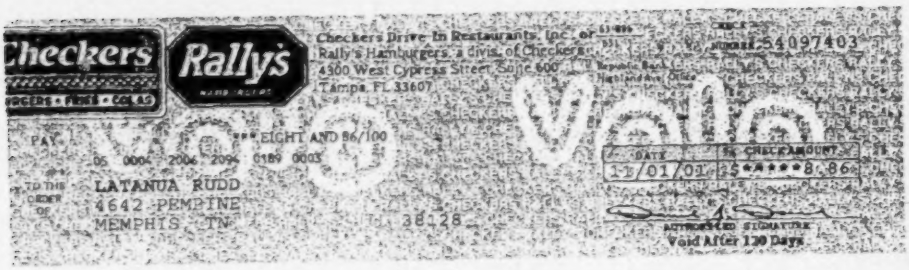
Exhibit #14



EMPLOYEE NO	EMPLOYEE NAME	SOCIAL SECURITY NO	PERIOD ENDING
409476606	RUDD LATANUA	409-47-6606	10/22/01
DATE PAID	RATE/SALARY	DEPT.	VAC HRS AVAIL	SICK HRS AVAIL	PERIOD BEGIN
11/01/01	6.0000	0189			10/09/01

EARNINGS	HOURS	CURRENT	YEAR TO DATE
REGULAR PAY	1.60	9.60	9.60
TOTAL PAY	1.60	9.60	9.60

DEDUCTIONS	CURRENT	YEAR TO DATE
FICA-OASDI	.60	.60
FICA-HI	.14	.14
NET PAY	8.86	8.86



Checkers Rally's

Checkers Drive-In Restaurants, Inc. or
Rally's Hamburgers, a divis. of Checkers
4300 West Cypress Street, Suite 600
Tampa, FL 33607

Republic Bank
Highland Ave. Office

CHECK NUMBER 54097403

PAY *** EIGHT AND 86/100

05 0004 2004 2094 0189 0003

TO THE ORDER OF LATANUA RUDD
4642 PEMPINE
MEMPHIS TN 38128

DATE 11/01/01
CHECK AMOUNT $*****8.86

AUTHORIZED SIGNATURE

Void After 120 Days

VOID

"54097403" :063108868: 0098308232"

Exhibit #5

TO: INSPECTOR WING

FROM: PATLOLWOMAN LATANUA KENNARD RUDD

SUBJECT: REQUEST TO WORK IN THE NARCOTIC DIVISON 12/23/00

To whom it may concern: I'm writing this letter in request to come to the narcotic divison. My request to work in this divison is based upon,
my interest to gain additional experience within the sheriff's department. I sincerely feel that I would be an asset to the narcotic divison.
Please allow me to extend a brief synopsis of my work history.

I've been employed with the shelby county sheriff's department for approximately 3 years, while presently assigned to the patrol divison.

I was previously employed by the city of memphis airport authority as an airport police officer for approximately 2 @1/2 years.

I was employed with shelby county probation divison as a probation officer for approximately 1 @1/2 years.

I was also employed at the shelby county correctional center for approximately 5 years as a correctional officer. In addition I would like to say,
while working there I assisted Lt. Beverly Archer, Capt. John Hall, and Sgt. Mark Dunbar in a lengthy assignment which was very successful
in bringing forth indictments involving several officers.

I was employed with shelby training center as a resident supervisor of juvenile delinquents for approximately 1@1/2 years.

In addition I've worked with the city of memphis police department as a (PST) police service technician for approximately 1@1/2 years.

I've been a volunteer mentor with st.peter home for girls for approximately 6@1/2 years.

IN CLOSING, IF MY REQUEST TO GAIN EXPERIENCE IN THE NARCOTIC DIVISON IS CONSIDERED IT WOULD BE GREATLY APPRECIATED.

SINCERELY

OFFICER LATANUA K. RUDD

Latanua K. Rudd #4335

Exhibit # 6

possible psychologically until her law suit is over and/or settled. When she has to deal with issues related to this suit (e.g. depositions) this is a very emotional experience for her. Ms. Westcott discussed with me her professional assessment, and it is consistent with mine.

Ms. Rudd continues to have Post Traumatic Stress Disorder, but now the Chronic form. Treatment at this point is usually directed at relapse mitigation or prevention rather than full rehabilitation, and I hold out little hope that she will return completely to her level of pre morbid functioning. She most likely can not return to her prior career, nor anything in law enforcement.

Therefore, to a reasonable medical certainty it is my opinion that:

1) Latanua Rudd is permanently impaired with regard to her ability to work in law enforcement. She can not work in Shelby County government in any capacity, and I would be surprised if she were able to work for any governmental department or agency.

2) She does have career interests, and in the future should be able to work in some field sufficiently different from law enforcement (perhaps some job counseling and training may be indicated. I do not recommend she attempt this until her legal case is resolved.

3) Her treatment should continue until she is through with her legal case and has started working again. As I think this treatment would be primarily for maintenance and relapse prevention, the frequency of sessions could probably be reduced to once or twice monthly, unless her condition deteriorates.

Neil E. Aronov, Ph.D.
Clinical Psychologist
TN Lic. 563

Exhibit 7

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Memphis District Office

1407 Union Ave., Suite 621
Memphis, TN 38104
PH: (901) 544-0115
TDD: (901) 544-0112
FAX: (901) 544-0111

Charge No.: 250-A1-0425

Latanua K. Rudd
4642 Pembine Drive
Memphis, Tennessee 38128

Charging Party

and

Shelby County Sheriff's Department
201 Poplar Avenue
Memphis, Tennessee 38103

Respondent

DETERMINATION

I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and timeliness, deferral and all other requirements for coverage have been met.

Charging Party alleges that she was discriminated against because of her sex (female) when she was subjected to a sexually hostile work environment while working in the capacity of Deputy Sheriff.

Respondent contends that the allegations made against the alleged harasser were not chargeable under the department's sexual harassment policy. Respondent also contends that appropriate disciplinary action was taken against the alleged harasser for violating other departmental policies such as unbecoming conduct, truthfulness and the use of force.

Evidence shows that the alleged harasser was in a managerial/supervisory position and should have known not to put himself in the position of being charged with sexual harassment. Therefore, Charging Party's testimony is considered credible.

Based on this analysis, reasonable cause exists in that Charging Party was subjected to a sexually hostile work environment because of her sex.

EXHIBIT
B

E COMMERCIAL APPEAL

ice Wednesday, October 8, 2003

Ex-deputy wins suit charging harassment

By Shirley Downing
downing@gomemphis.com

A federal court jury has awarded $952,000 to a former sheriff's deputy who was handcuffed to an office file cabinet by a male colleague, who touched her in a sexually unwelcome manner and tried to undress her.

Latanua Rudd, now 34, said she was so upset by the December 2000 incident that she has been unable to work.

The male deputy, Sgt. Lance Burton, 60, was demoted and subsequently retired from the Shelby County Sheriff's Office, said County Atty. Brian Kuhn.

Kuhn is reviewing the case to identify possible grounds for appeal or further motions.

The case, which was heard before U.S. Dist. Judge Samuel H. Mays, is one of several harassment or civil rights lawsuits filed in recent years involving the county sheriff's office, jail or nursing home.

See HARASS, A2

From Page A1

Harass

Rudd's attorney Les Jones said Rudd would not comment on Tuesday, the morning after the jury's verdict. The incident has been "quite an ordeal for her," he said.

"This is a very unique case," Jones said. "It is not every day that a patrolman gets handcuffed to a file cabinet by a sergeant."

Latanua Rudd

Lance Burton

Burton could not be reached for comment Tuesday. But after his February 2001 disciplinary hearing, officials said the incident occurred at a Christmas office party where there was "a certain amount of frivolity" and teasing.

The complaint, which does not mention a party, said Burton had confronted Rudd several times after her hiring in 1997 and touched her inappropriately.

Then, in December 2000, she was assigned to the Fugitive Transportation Division in an office near Burton's.

On Dec. 22, she was working in her cubicle when she said Burton came in and grabbed her shoulders and pressed himself against the back of

"Despite her best efforts to protect her weapon and herself, Sgt. Burton handcuffed Ms. Rudd to a filing cabinet inside the cubicle," the lawsuit said.

SUE THE COUNTY

■ **September 1994:** County officials approve a settlement of $3.5 million-plus lifetime medical care for a 25-year-old man who had been in a coma since a 1991 fight with sheriff's deputies.

■ **October 1995:** A $1 million settlement is approved for a county jail inmate beaten and stomped by other inmates.

■ **October 1998:** A female dispatcher wins a $127,000 settlement – $77,000 of it paid by then-sheriff A. C. Gilless – to end a sexual harassment and retaliation lawsuit against Gilless.

■ **April 1998:** The county approves a $250,000 settlement for a jail inmate scarred by a brown recluse spider bite.

■ **January 1999:** Former sheriff's internal affairs director Harold Hays settles a wrongful-termination lawsuit against the county for $650,000.

■ **July 2000:** Jail officials test security in the county's downtown jail by sending in two men with a fake gun. Employees later file a $22 million lawsuit claiming they were traumatized.

■ **March 2001:** Taxpayers pay $27,000 to settle a sexual harassment case against Gilless brought by a female deputy.

■ **December 2002:** A $10 million lawsuit is filed in federal court by Johnnie Cochran's firm against the county-owned Oakville Health Care Center on behalf of Pamela Townsel in the death of Everlina M. Smith, 88, who died at the center in August 2002. The lawsuit is among at least 10 filed in the last three years against the center.

■ **October 2003:** A federal court jury awards a former sheriff's deputy $952,000 in a sexual harassment lawsuit.